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CLIMATE AND CRIME: AN ANALYSIS IN INDIAN PERSPECTIVE

Pramod Tiwari*

Prof (Dr.) Pinki Sharma**

Abstract-Crime causation is discussed by criminologists from centuries together. Earlier it was demonological explanation but latter shifted to many more other factors such as physical structure, imitation, differential association and climatic effect etc. With this background in this research paper an attempt has been made to analyse the climatic effect of criminality in Delhi. Data for the present study has been obtained from the various police stations of Delhi for the year 2021. Mainly the effect of weather on body and property offences has been analysed. A humble attempt has been made to see the effect of extreme hot and cold weather on crime causation in Delhi. This research paper tried to find out the applicability of findings of cartographic school of criminology on Delhi.

Keywords-Climate, weather, cartographic criminology, body offences and property offences.

Introduction:

Perhaps the most familiar stereotype in recent criminological literature is the traditional estimate of the place of Lombroso in the history of the scientific study of crime and criminals. Almost unanimously he has been spoken of as the founder of modern criminology,' and a host of developments, such as the indeterminate sentence, the Elmira Reformatory, probation, parole, the study of juvenile delinquency and even an interest in the problem of vagrancy, have been linked with his name. Writings in the field of criminology prior to Lombroso are assumed to be of little importance and are usually dismissed with a bare reference to some of the early reformers such as Howard (I 726-I832), Romilly (I757-I8I8), Beccaria (I738-94), Bentham (I748-I832), and a few others[1]. The developments in England, France, Germany, Belgium, and other Continental countries in the half-century between 1830 and 1880 appear to constitute a sort of no man's land in historical criminology, judging from the almost complete absence of references to that period. There is no actual evidence in the voluminous criminological literature of the nineteenth century, before or after the time of Lombroso, which justifies the extravagant eulogies that are made of him or that gives the slightest grounds for considering him the first to study crime or criminals scientifically[2]. We shall attempt in this paper to indicate some

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[1]Per-Olof H. Wikström, Vania Ceccato, Beth Hardie and Kyle Treiber" Activity Fields and the Dynamics of Crime: Advancing Knowledge About the Role of the Environment in Crime Causation", Journal of Quantitative Criminology, March 2010, Vol. 26, No. 1, Special Issue on Empirical Evidence on the Relevance of Place in Criminology (March 2010), pp. 55-87 available at https://www.jstor.org/stable/23367577.

[2]Alfred Lindesmith and Yale Levin," The Lombrosian Myth in Criminology" American Journal of Sociology, Mar., 1937, Vol. 42, No. 5 (Mar., 1937), pp. 653- 671 available at https://www.jstor.org/stable/2767760.

of the factors which may account for the origin and dissemination of this Lombrosian myth and to give some idea of the true place and significance of the Italian school. We shall also have occasion to call attention to valuable research work in various phases of criminology during the half-century that preceded the appearance of Lombrosianism, i.e., to studies that were carried on in the scientific tradition which had its origins primarily in the outstanding studies of A. M. Guerry (I802-66) and A. Quetelet (I796-I874).

It was this older tradition which gave the contemporaries of Lombroso the evidence and standards in terms of which his theories were criticized and rejected and which enabled sound scholarship of that day to form an accurate estimate of the historical significance of the "new school." Although the roots of the scientific study of crime extend far into the past, criminology as a modern social science may be said to have begun approximately in the 1830's with the publication of the works of Quetelet and A. M. Guerry on this subject. Their principal source of inspiration was the official crime statistics which began to be published in a useful and reliable form in most European countries after France had set the standard with her Comptegenerale, first published in I825. The influence of Quetelet in attracting the attention of scholars all over Europe to the possibilities of the scientific study of social phenomena and to the study of crime was enormous. The importance of his influence on social science is generally recognized, but his studies in other fields overshadow his work in criminology and as a result he is rarely mentioned today for his pioneer efforts in this field. A. M. Guerry, who devoted his attention exclusively to the study of crime and of "moral statistics," is scarcely less important. In I829 he first made use of shaded maps to represent crime rates, and in a famous volume in I833 this "cartographic method," as it was called, was further improved and used as a basic technique in isolating causal relationships as "ecological" maps are used today. This 1833 work of Guerry's attracted immediate attention in France and in other countries and was taken as a model by criminologists all over Europe during the next few decades.

The "cartographic" or "geographical" method of analysis which Guerry introduced in his Essaisur la statistique morale de la France in I833 and later elaborated in his monumental La statistique morale de l'Angleterrecomparee avec la statistique morale de la France, (1860) became an accepted and common technique in the analysis of statistical data in criminology and in other social sciences. Besides the use made of it by individual scholars, it was also employed by the governments of several European countries in the presentation of official criminal statistics. It is not always recognized that the "ecological approach" to the study of crime as it is carried on today may be fairly said to have been first employed more than a century ago. The method of Guerry was in a sense opposed to that of Quetelet. Whereas the latter emphasized the regularity of aggregate results and considered the effects of sex, age, climate, and other "natural" causes, speaking of free will as a disturbing element, Guerry broke up aggregate results in terms of small geographical units and attempted to account for the variation in crime rates from one period to the next and from one district to the other in terms of an analysis of general social conditions and of differences in legislation. It was this aspect of his method which no doubt led him to prefer to call it analytique morale rather than "social physics," the term employed by Quetelet.

Climate and crime in Delhi:

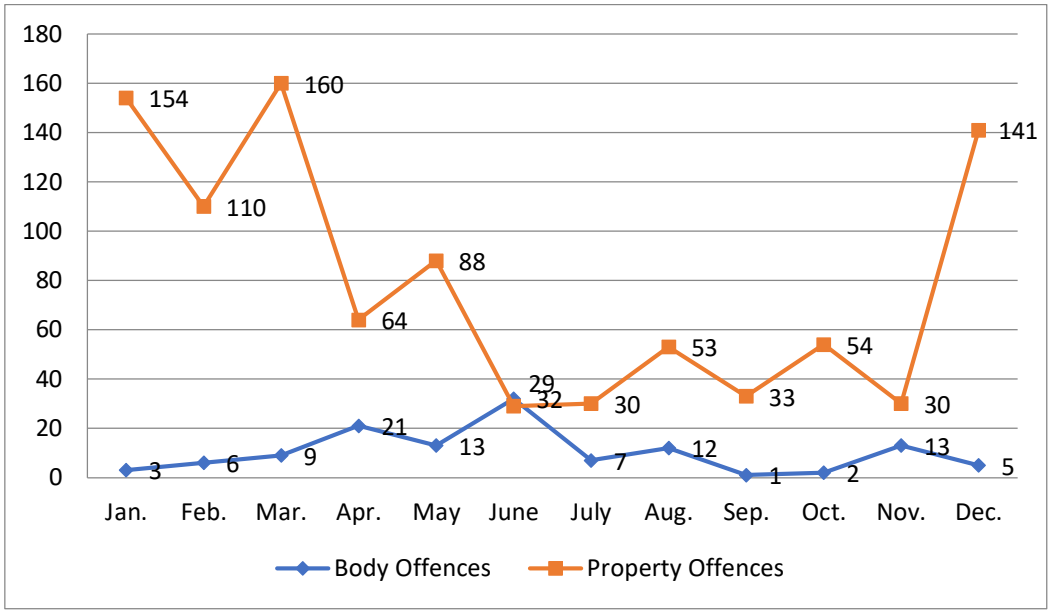
In the aforesaid background a humble attempt is made in this paper to find out the effect of climate on crime in Delhi. For this study the crime data mainly the commission of body and property offences have been taken from various police stations of Delhi namely; PS Defence Colony, PS Nihal Bihar, PS Lodhi Road, PS KM Pur and PS Kirti Nagar of Delhi. The crime data has been taken month wise and then the seasonal effect on body offences and property offences in Delhi is analysed. A table for these offences is prepared followed by an elaborative Graph and analysis thereof.

Table of Crime Data, 2021[3]

Offences ↓ / Months →		Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.
Body Offences	Murder	-	-	1	-	1	1	-	-	-	-	-	-
	C.H.	-	-	-	-	-	1	-	-	-	-	-	-
	G. Hurt	-	1	-	-	1	1	1	1	-	-	-	-
	Kidnapping	1	1	3	11	1	18	4	9	-	-	2	1
	Rape	1	3	1	4	3	3	-	1	-	-	10	3
	Wrongful/ Restraint	1	4	2	6	7	8	2	1	1	2	1	1
	Criminal Force	-	-	-	-	-	-	-	-	-	-	-	-
	Total	**3**	**9**	**7**	**21**	**13**	**32**	**7**	**12**	**1**	**2**	**13**	**5**
Property Offences	Theft	140	105	54	61	81	21	21	51	31	51	22	118
	Robbery	8	1	1	2	4	6	8	1	1	1	4	10
	Dacoity	1	-	-	-	-	-	-	-	-	-	1	1
	Mischief	1	1	1		1	1	-	1		1		1
	Criminal Misappropriation	1	1	-	1	1	-	-	-	-	1	1	1
	House Trespass	3	2	4	-	1	1	1	-	1	-	2	10
	Total	**154**	**110**	**160**	**64**	**88**	**29**	**30**	**53**	**33**	**54**	**30**	**141**

[3] Crime data from PS Defence Colony, PS Nihal Bihar, PS Lodhi Road, PS KM Pur and PS Kirti Nagar of Delhi

IV- Figure of Crime Data of Year 2021[4]



Data Analysis:

The effect of climate on body and property offences in Delhi is analysed on the basis of crime data collected from five police stations of Delhi for the year 2021. This graphical representation shows that body offences are more during summer months like April, May and June whereas less during winter months like December, January and February. Thus it can be said that there is relation between climate and body offences in Delhi, as body offences are more in summers and less in winters.

Again, this graphical representation shows that property offences are more during winters months like January, February, March and December whereas less during summer months like April, May, June and July. Thus, it can be said that there is relation between climate and property offences in Delhi, as property offences are more in winters and less in summers.

Concluding Observations:

Climate crime relation in Delhi reveals that body offences are more in summers and less in winters whereas property offences are more in winters and less in summers. Thus, it can be concluded that climate is a factor which affect criminality in Delhi although it may not be the sole factor. Therefore, it is suggested that there should be deep surveillance during hot summer to prevent body offences and during extreme winters to prevent property offences in Delhi. Prevention is better than cure is a celebrated saying and hence it is submitted

[4] *Supra note* 3

that in addition to punitive and reformative criminology, we should think for preventive criminology. Peace keeping criminology is a model as suggested by Foucauldian governmentality theory, should also be applied in Delhi.

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PRISONERS' RIGHT TO PROCREATE AND CONJUGAL VISITS IN INDIA: A CRITICAL ANALYSIS**

Dr. P.K. Pandey*

"In a case where the innocent spouse is a woman and she desires to become a mother, the responsibility of the State is more important as for a married woman, completion of womanhood requires giving birth to a child. Her womanhood gets magnified on her becoming a mother, her image gets glorified and becomes more respectful in the family as well in the society. She should not be deprived to live in a condition wherein she has to suffer living without her husband and then without having any children from her husband for no fault of her."

-Rajasthan High Court[1]

Abstract-The prisoners in India have been guaranteed various rights, in principle, ensuring their dignity, maintaining their privacy and providing an atmosphere wherein their all-round development and growth may take place. One of the rights of prisoners is right to procreate and conjugal visit which is directly related with human rights of prisoners and prisoners' partner. In the light of above facts, this paper unearths the relevant provisions relating to prisoners' right to procreate and conjugal visits in India in detail. Further, it gives some sensible suggestions also.

Keywords-Prisoners, Conjugal Right, Human Rights, Constitutional Rights.

Introduction:

The present criminal justice system is based on the basic principle of serving the public interests by punishing the offenders, protecting the innocents and compensating the victims unlike earlier system where the single objective was to punish the offenders in such way which may cause deterrent effects and send a message to the society that others will not think to repeat for committing such offence. But, the developmental human rights jurisprudence brought the element of reformative approach which is based on taking individuals as human beings and respecting their minimum human rights so that they also may be accommodated and rehabilitated in the society who have committed wrongs against the interests of the society. This theory is based on the connotation that any person is not born as criminal rather the social factors of the respective society are responsible for criminality of a person. From this aspect, the prisons should be taken as reformatory houses or hospitals where the criminals should be provided proper treatment which in turn will provide them opportunities to improve themselves and after release from prison they may contribute in building, reconstructing and developing the respective nation.

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****Under C.V. Raman Minor Research Project Scheme of CSJMU, Kanpur.**

[1] *Nand Lal v. State*, D.B. Criminal Writ Petition No. 10/2022 on 05 April, 2022 (Rajasthan)

Understanding Prisoners' Right to Procreate and Conjugal Visits:

One of the basic differences in living and non-living is the capacity of procreation. The power to procreate is associated with the basis of the evolution, creation and development of life on this planet. Thus, in general, the nature has given this right to every human being without any discrimination. Every individual likes to exercise this right which is directly linked with his/her life, liberty, dignity and freedom. In Indian culture and philosophy, there are sixteen sacraments (sanskars) out of which *Garbhadhan*, i.e. 'attaining the wealth of the womb' is a pious and holy sacrament which is, *inter alia*, intended to preserve lineage by conjugal association. In Hindu philosophy, every person is under obligation to discharge *pitri rinn* (parental debt) which is being carried and forwarded by our ancestors. Discharging this debt is the foundation of maintaining continuity of life. Further, as per Hindu philosophy there are four Purusharthas *i.e.* aims of human life-Dharma, Artha, Kama and Moksha-for every person. Out of four purusharthas, three (Dharma, Artha and Moksha) may be performed alone but the fourth *i.e.* Kama may only be performed in conjugal association of the respective spouse, if he/she is married. In conjugal visit, the prisoner is allowed to meet privately with his/her spouse in a given space ensuring privacy of the parties and they are allowed to establish intimate relationship.

Next, the spouse of the prisoner, being innocent, has also right to be in conjugal association with his/her spouse. Particularly, when the innocent spouse is woman, it is said that 'motherhood is the completeness of a woman'. The nature has given special power only to women to give new life by birth. When a woman acquires motherhood, not only her image is glorified rather she becomes more respectful in family as well as in society too. This is possible only through association of her husband. Thus, it may be said that to preserve the lineage, every person including prisoner has right to procreate by conjugal association with his/her legally wedded spouse.

In respect of prisoners, this is a general question-whether the prisoners have right to procreate and conjugal visits? Actually, the genesis of this question lies in the feudal argument that only the law abiding individuals have right to enjoy all the rights guaranteed by law. The prisoners, being the violators of law, should not be given any such right otherwise the purpose of keeping them within four-walls will frustrate. The supporters of this argument are in favour of subjecting the prisoners more and more in inhuman, unreasonable and undignified atmosphere without considering them as a human being. This was the situation not only in India rather in other countries also. This was general view of the society including government officials that a person in prison is guilty and his/her all rights are forfeited. Kerala High Court in *A Convict Prisoner in the Central Prison v. State of Kerala*[2], said that "a prisoner who invites incarceration by his conduct, cannot expect the same freedom as free citizens." Even the courts were also hesitant in interfering with internal matters of the prison administration taking the plea of doctrine of separation of powers.

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[2] 1993 Cri LJ 3242

But, the modern concept of prison is evolved as a reformatory institution wherein the prisoners are considered as a human being having right to maintain their life, liberty, dignity etc. At the same time, it is also correct that the prisoners have not equal rights like a free person. The US Supreme Court in *Turner v. Safley*[3], held that "a prison inmate retains those rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Lord Wilberforce in *Raymond v. Honey*[4], said that "convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication." The modern judicial and human rights philosophy, being in favour of personal autonomy, defends to provide right to procreate and conjugal visits to every prisoner.

Prisoners' Right to Procreate and Conjugal Visits: International Scenario

At the international level, there are various instruments guaranteeing the rights of every individual which is equally available to prisoners also. In addition to this, there are some specific and special instruments which are directly related with prisoners' rights. From the human rights aspects, the Universal Declaration of Human Rights[5] is a milestone document. Additionally, two covenants[6] have effectively covered the availability of human rights for all without any discrimination.

The Nelson Mandela Rules[7] in its Rule 58 has recognised the conjugal visits as under-

> 1. Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:
> (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and
> (b) By receiving visits.
> 2. Where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity.

In some countries, the prisoners have been granted the conjugal rights under the conjugal visitation programmes. In USA, the federal law does not provide such privilege but some of the States (California[8], Mississippi[9], New York, and Washington) have granted this right to prisoners which is known as 'family

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[3] 482 U.S. 78, 85 (1987)
[4] [1982] 1 All ER 756
[5] Article 16 deals with right to marry and family.
[6] *International Covenant on Civil and Political Rights, 1966* [General Assembly resolution 2200A (XXI)]; *International Covenant on Economic, Social and Cultural Rights, 1966* [General Assembly resolution 2200A (XXI)].
[7] United Nations Standard Minimum Rules for the Treatment of Prisoners *vide* United Nations General Assembly resolution A/RES/70/175.
[8] California allowed conjugal visit in 1968.
[9] First state to permit conjugal visits in 1918.

visiting program' or 'family reunion visits'. In other countries also like England and Wales, Denmark, Spain, and Sweden etc. the conjugal visit has been provided to the prisoners[10]. The procedure of application, duration, mode of conjugal meets vary from country to country.

Right to Procreate and Conjugal Visits: Indian Aspects

The modern Indian prison system is based on mostly callous colonial compilations wherein the prisoners were treated not as valuable member of the society rather like objects. The prisoners' life and existence completely depends on the mercy of prison authorities. The maltreatment with prisoners, offences against them, corrupt practices and violation of their minimum rights are some of the features of Indian prison system. In such scenario, the question of right to procreate and conjugal meet could not be thought by the prisoners earlier but with the recognition of prisoners' rights particularly by the Indian judiciary brought a ray of hope and prisoners started to demand for their rights. There are plethora of cases wherein the Indian judiciary has effectively come forward to safeguard the existence, rights, and interests of the prisoners.[11] Supreme Court in *D. Bhuvan Mohan Patnaik v. State of Andhra Pradesh*[12], held that "convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A prisoner is deprived of fundamental rights like the right to move freely throughout the territory of India or the right to practice a profession. But other freedoms like the right to acquire, hold or dispose of property are available to the prisoner. He is also entitled to the right guaranteed by Article 21 that he shall not be deprived of his life or the personal liberty except according to the procedure established by law Therefore, under our Constitution the right of personal liberty and some of the other fundamental freedoms are not to be totally denied to a convict during the period of incarceration."

Supreme Court in *Charles Sobraj v. Superintendent, Central Jail, Tihar*[13], affirmed that "the court is reluctant to intervene in the day-to-day operation of the State penal system; but undue harshness and avoidable tantrums, under the guise of discipline and security, gain no immunity from court writs. The reason is, prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the rights enjoyed by prisoners under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise… imprisonment does not spell farewell to fundamental rights".

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[10] Tomer Einat and Sharon Rabinovitz, "A Warm Touch in a Cold Cell: Inmates' Views on Conjugal Visits in a Maximum-Security Women's Prison in Israel", Vol. XX(X), 2012, *International Journal of Offender Therapy and Comparative Criminology* 1-24 at 2.

[11] *Kharak Singh v. State of UP*, 1964 SCR (1) 332; *George Fernandes v. State of Maharashtra*, (1964) 66 BOMLR 185; *Jagmohan Singh v. State of U.P.,* AIR 1973 SC 947; *Sheila Barse v. Union of India*, 1994 (4) SCALE 493; *D.K. Basu v. State of W.B.,* (1997) 1 SCC 416; *Re-Inhuman Conditions in 1382 Prisons*, (2017); *State of Maharashtra v. Prabhakar Pandurang Sanzgir*, 1986 (1) BomCR 272; *In Re: Contagion of Covid 19 Virus in Prisons*, (2020)

[12] 1975 SCR (2) 24

[13] 1979 SCR (1) 512

Further, in *State of Andhra Pradesh v. Challa Ramkrishna Reddy*[14], the Apex Court observed that "a prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his fundamental rights including the right to life guaranteed to him under the Constitution."

Pointing out the objectives of punishment, the Supreme Court in *Sunil Batra v. Delhi Administration*[15], (popularly known as Sunil Batra-I) observed that "punishments, in civilised societies, must not degrade human dignity or wound flesh and spirit. The cardinal sentencing goal is correctional; changing the consciousness of the criminal to ensure social defence. Where prison treatment abandons the reformatory purpose and practises dehumanizing techniques it is wasteful, counter-productive and irrational, hovering on the hostile brink of unreasonableness. Nor can torture tactics jump the constitutional gauntlet by wearing a 'preventive' purpose. Naturally, inhumanity, masked as security, is outlawed beyond backdoor entry, because what is banned is brutality, be its necessity punitive or prophylactic."

Hon'ble Supreme Court in *Sunil Batra v. Delhi Administration*[16], (popularly known as Sunil Batra-II) said that "prisons are built with stones of law' and so it behoves the court to insist that, in the eye of law, prisoners are persons, not animals, and punish the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed ill a little, brief authority', when Part III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock... subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected." In this case, the Court said that "whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods 'right, just and fair'" and mandated to safeguard the legal rights of prisoners. Further, the Court reminded that "a prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through 'writ' aid. The Indian human has a constant companion-the court armed with the Constitution."

In *Poola Bhaskara Vijayakumar v. State of Andhra Pradesh*[17], Andhra High Court observed that "a prisoner does not cease to be a person merely because he is a prisoner: a prisoner may not enjoy his right to full life and personal liberty guaranteed in Art. 21 because his imprisonment has subtracted a portion of that right. But to the extent that enjoyment of the guaranteed right of Art. 21 is not inconsistent with his condition of imprisonment, a prisoner is still entitled to the protection of Art. 21 of the Constitution. Law no longer is based upon the theory that a convicted person suffers from all public and private legal disabilities."

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[14] AIR 2000 SC 2083
[15] AIR 1978 SC 1675
[16] 1980 SCR (2) 557
[17] AIR 1988 AP 295

"The Judiciary as the principal executor and promoter of the rule of law has to have major stakes in respect of the conditions prevailing in the prisons. The duty of the Courts towards jail reforms has become heavier than before after the enforcement of our Constitution as Article 21 guarantees dignified life to one and all including the prison-inmates."[18] Thus, it is evident from the above that the Indian judiciary has actively evolved mechanisms to protect the rights of prisoners by liberally interpreting the constitutional provisions in favour of the prisoners particularly Article 21 wherein the right to life and personal liberty of everyone is guaranteed. Earlier the connotation 'right to life' was narrowly interpreted by the courts but the Supreme Court in *Maneka Gandhi v. Union of India*[19], widened its meaning, by including a dignified life. Madras High Court[20] said that "dignity is an inseparable facet of human personality… Dignity is the core value of life and personal liberty which infuses every stage of human existence. Human dignity is an essential element of a meaningful existence. The right to a dignified life existence is central to the pursuit of a meaningful existence. Dignity ensures the sanctity of life." Though, various rights of prisoners have been evolved by the judicial interpretations but the right to procreate and conjugal visits could not be effectively pleaded earlier before the Supreme Court.

In India, there is no any statute, rules or policy specifically dealing with the right to procreate and conjugal visits of the prisoners even in the era of human rights for which the whole world community is attempting to respect, protect and safeguard it. Not only this, the Jail Reforms Committees which were constituted from time to time also failed to consider this particular issue. Actually, this right was never the matter of consideration on the part of prison administration or the government. It was thought that when a prisoner was temporarily released on parole or furlough, he/she could exercise this right. Granting temporary release from the prison is within the jurisdiction of State Governments. There is no any central legislation dealing with parole and furlough having uniform norms for the whole country. *The Model Prison Manual, 2016*[21], which is intended to provide uniform laws, rules and regulations to govern prison administration all over the country, has elaborately contained the provisions for prisons and prisoners but it does not deal with right to procreate and conjugal visits. This Manual in its Chapter XIX deals with parole and furlough but it does not contain the ground of parole and furlough for procreation and conjugal meets. It is noteworthy that having the system of procreation and conjugal meets in prisons, taking care the prisoners' privacy, is very helpful for the State, the prisoners, their spouses and the society as whole as under-

- Less cases of homosexuality and sexual offences in prisons will be reported.
- Prisoners, being mentally, physically and emotionally satisfied, will adhere prison norms. It will positively alter the behaviour of the prisoners.

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[18] *Jasvir Singh v. State of Punjab,* 2015 Cri.L.J. 2282 (Punjab-Haryana)
[19] AIR 1978 SC 597
[20] *Rahmath Nisha v. Additional Director General of Prison*, WP(MD)No.12488 of 2019 on 28 May, 2019 (Madras)
[21] Available at https://www.mha.gov.in/sites/default/files/PrisonManual2016.pdf

- Spouses of the prisoners may discharge their religious, cultural and other obligations.

Actually, "conjugal visit programs decrease the tension and stress of prison life, which in turn reduces the amount of violence, including sexual assault, within prison walls."[22] A report prepared by the University of Alabama mentions some of the major benefits of conjugal visits as: (1) the preservation of family life; (2) an additional incentive for positive institutional behaviour; (3) potential reduction in escapes (4) reduction of sex problems and homosexuality; and (5) the potential for improved prisoner morale.[23]

The ban on spousal visits was found to be grossly disproportionate and a violation of the fundamental right guaranteed under Article 21 of the Constitution of India by the Madras High Court in *J. Vidhya v. Additional Director General of Prison*[24]. Supreme Court in *Rama Murthy v. State of Karnataka*[25], has correctly mentioned the importance of prison visit by the spouse in the following terms-

> "Visit by him/her has special significance because a research undertaken on Indian prisoners sometime back showed that majority of them were in the age group of 18 to 34, which shows that most of them were young and were perhaps having a married life before their imprisonment. For such persons, denial of conjugal life during the entire period of incarceration creates emotional problems also. Visits by a spouse is, therefore, of great importance."

Further, the court[26] noted that "if the offenders and visitors are screened, the same emphasises their separation rather than retaining common bonds and interests. There is then urgent need to streamline these visits."

Recognising the privacy rights of the prisoners, the Madras High Court in *Rahmath Nisha v. Additional Director General of Prison*[27], said that "when a prisoner meets his wife, he may like to hold her hands. His emotions are bound to find a physical expression. While private prison cottages may be a distant prospect, the privacy and dignity of the prisoners should be scrupulously protected. Conversations between prisoner and his spouse should be unmonitored. Of course, not only the prisoner but also the spouse shall be carefully searched before and after the interview. The prison authorities are obliged to facilitate the meetings between the prisoner and his wife in a reasonably private sitting."

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[22] Rachel Wyatt, "Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?", Vol. 37: 2 & 3, 2006 *Case Western Reserve Journal of International Law* 579-614 at 579.
[23] *National Institute of Law Enforcement and Criminal Justice*, available at https://www.ojp.gov/pdffiles1/Digitization/39387NCJRS.pdf
[24] W.P.(MD)No.20995 of 2021 on 25 November, 2021 (Madras)
[25] (1997) 2 SCC 642
[26] (1997) 2 SCC 642
[27] 2020 (2) CTC 417

The system of parole or furlough is evolved as a 'penological innovation for checking recidivism'[28] and is not available on the ground of 'procreation and conjugal meets' in India.

As there is no any statutory provision for prisoners' right to procreate and conjugal visits, they have taken the recourse of Article 21 of the Constitution to enforce this right. Recently, Rajasthan High Court has ruled that Article 21 'includes within its ambit the prisoners also.'[29] In 2010, hearing a Public Interest Litigation on treatment facilities of HIV positive prisoners, the Bombay High Court through Justice P B Majumdar and Justice R G Ketkar asked the state government to explore the possibility of facilitating prisoners, who have been lodged for two to three years in jails, to meet their wives sometime every month in total privacy. Justice Majumdar observed, "There may be physical needs. See whether a separate place can be given to a prisoner and his wife for a day or two. The government is spending crores of rupees to curb the AIDS menace in jails. Instead why don't you take preventive steps".[30]

In respect of prisoners' right to procreate and conjugal visits, an unsuccessful attempt was made in the year 2012 before the Andhra Pradesh High Court in form of a Public Interest Litigation i.e. *G. Bhargava v. State of Andhra Pradesh*[31], wherein the Hon'ble High Court rejected the prayer made by the petitioner seeking a direction to the State to take immediate steps and allow the prisoners to have a conjugal visit to the spouses of prisoners across the State of Andhra Pradesh. The Court, refusing the contentions of the petitioner that conjugal visits are covered by Article 21, observed that the right and liberty of the prisoner to live with human dignity in the four corners of the prison is not taken away and the same will be governed in accordance with the guidelines and regulations framed by the State for maintenance of the jails. Further, the court observed that "even if such conjugal visits are to be allowed such visits will have to be necessarily allowed to only select prisoners as per rules keeping in view their good behaviour during the period of imprisonment actually undergone in the prison. In such a situation, chances of the environment in the jail getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit or allowance and this may lead to new difficulties." Furthermore, the court noted that "to mitigate the situation and to enhance continued relationship of prisoners with their spouses, if necessary, suitable amendments may be brought to the Prison Rules for sanction of longer periods of furlough/leave to enable them to stay with their spouses, at least in respect of prisoners who are at the prime age whenever they avail the benefit of furlough/leave."

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[28] *Suresh Chandra v. State of Gujarat*, AIR 1976 SC 2462

[29] Supra note 1

[30] Why can't prisoners have sex in jails, court asks Maharashtra govt, *Times of India*, 14 January, 2010 available at https://timesofindia.indiatimes.com/india/majority-of-street-children-face-sex-abuse-in-india-study/articleshow/5445351.cms

[31] PIL No. 251 decided on 16th July, 2012

In *Jasvir Singh v. State of Punjab*[32], the wife and husband, convicted prisoners, were lodged in same jail but in separate cells in respect of kidnapping and murdering a minor for ransom. They requested the Punjab and Haryana High Court to command jail authorities to allow them to live together and resume their conjugal life for the sake of progeny. Their claim was based on Article 21 of the Indian Constitution which allows propogation of species for which sex life is important. The following issues to be decided by the Courts were there-

(i). Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our constitutional framework?
(ii). Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?
(iii). Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?
(iv). If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Discussing various international, regional and Indian instruments, the Court observed that-

> "[T]here is no gainsaying that ordinarily the right to conjugal visits and procreation is a component of the right to live with dignity and is thus ingrained in the right to life and liberty guaranteed under Article 21 of our Constitution to which a very expansive, dynamic and vibrant meaning has been given by the Apex Court through several historical pronouncements. The right to conjugal visits or procreation or for that matter the right to secure artificial insemination as a supplement, are also, thus, subject to all those reasonable restrictions including public order, moral and ethical issues and budgetary constraints which ought to be read into the enjoyment of such like fundamental right within our Constitutional framework."

Further, the court said that-

> "The right to conjugal visits or procreation inheres right to privacy, dignity, respect and free movements as well. Good behaviour of the convict, unlikelihood of his/her endangering the State security, peace and harmony or the social and ethical order, financial and society security of the convict and his/her family etc. are several other relevant factors to determine the extent and limitations for translating such a right into reality… Jail reforms have been the priorities of none. A little improvement in guaranteeing basic human rights, though still far from satisfactory, has happened with the tireless efforts of the Indian judiciary and a constant monitoring through jail inspections by the District and High Courts with due help from the public spirited organizations and individuals from the civil society. None of the

[32] 2015 Cri.L.J. 2282 (Punjab-Haryana)

> serious issues like overcrowding, lack of clean and sufficient toilets, requisite and healthy food, medical facilities, telecommunication facilities or re-orientation have been addressed nor there appears to be any commitment of the executive in this direction. There are no comprehensive plans for rehabilitation and re-settlement of the convicts on their release and many of them step out of a dark hole to fall into a darker ditch."

The Court directed to the State Government to form a Jail Reforms Committee to formulate, *inter alia*, a scheme for creation of an environment for conjugal and family visits for jail inmates and identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities. The Committee was also asked to classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child.

In *Meharaj v. State*[33], the wife of a life convict prisoner approached the Madras High Court to grant him leave for thirty days to assist her in the infertility treatment to be undergone by her. The Court analysing various cases held that-

> "Being human beings, prisoners also would like to share their problems with their life partner as well as with the society. Just because, they are termed as prisoners, their right to dignity cannot be deprived… [P]risons have to be transformed as homes for the purpose of giving training morally as well as intellectually, so that the prisoners are denuded of the qualities of a criminal. The psychologists and psychiatrists believe that the frustration, tension, the ill feelings and the heart burnings can be reduced and a human being can be better constructed if they are allowed conjugal relationship even rarely… Conjugal visit leads to strong family bonds and keep the family functional rather than the family becoming dysfunctional due to prolonged isolation and lack of sexual contact."

Further, the court has nicely elaborated the need of conjugal visits as under-

> "Conjugal visits of the spouse of the prisoners is also the right of the prisoner. This right is recognized at least in few countries of the world. When the prisons are overcrowded providing place for conjugal visits may be a problem, but the Government has to find out a solution. Today, conjugal visits are called extended family visits (or, alternately, family reunion visits). The official reason for these extended family visits is three-fold: to maintain the relationship between the prisoner and the members of his family, to reduce recidivism, and to motivate or to provide an incentive for the good behavior."

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[33] H.C.P. No.1837 of 2017 on 11 January, 2018 (Madras)

In this case, the High Court granted temporary leave initially for a period of two weeks to the convicted prisoner.

Again the same wife, as mentioned in above case, approached the Madras High Court on the same ground after three years in *Meharaj v. State*[34]. The court, distinguishing between the status of law abider and violator, warned to take a cautious decision so that the ratio propounded by the court is used for the purpose and it should not be claimed as a course. The Court mentioned that "a convict cannot enjoy all the liberties as are available to a common person, otherwise there would no difference between a law-abiding citizen and a law-violating prisoner… The denial of conjugal relationship of the convict for specific purpose may amount to denial of the fundamental right guaranteed under Article 21 of the Constitution of India. The specific purpose may be infertility treatment or some similar reason, but it should not be construed to be a fundamental right for having conjugal relationship as a course. This would make a difference between the law abider and violator in regard to rights guaranteed under Article 21 of the Constitution of India." Further, the court held that "if leave for having conjugal relationship is recognized to be a right under Article 21 of the Constitution of India, the prayer of similar nature can be made by the accused or his/her spouse time and again to have conjugal relationship." Thus, it is evident from this decision that the court is very cautious in authorising prisoners for fulfilling their right under Article 21 of the Constitution. In this case, the court restricted the scope of the availability of prisoners' conjugal visits only for specific purpose.

In *P.Muthumari v. Home Secretary (Prison)*[35], the wife of a life convict prisoner requested the Madras High Court to grant parole for two months for the purpose of conjugal visit. Following the ratio of *Meharaj v. State*[36], the Court accepted the request of parole of two months for conjugal visits.

On the basis of ratio of the *Jasvir Singh v. State of Punjab*[37], the prisoners' right to procreate and conjugal meets have been accepted and enforced in *Arun v. State of Haryana*[38], wherein the petitioner requested to grant parole for conjugal visit and procreation.

In *Rajeeta Patel v. State of Bihar*[39], the petitioner, the wife of a prisoner, requested the Patna High Court to grant her husband, who was convicted and detained in a jail, to get a leave of about 90 days for purpose of conjugal visits and to take care of the infertility problem by providing medical treatment of the petitioner so that she may beget a child. The Court discussing the historical prison system in India and leading cases related to personal liberty and being in complete agreement with the views expressed by Hon'ble Punjab & Haryana High Court in

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[34] H.C.P. (MD) No.365 of 2018 on 3 September, 2021(Madras)
[35] H.C.P. No.2447 of 2018 on 26 November, 2018(Madras)
[36] Supra note 33.
[37] Supra note 32.
[38] CWP No.3311 of 2019 on 12 April, 2019 (Punjab-Haryana)
[39] Criminal Writ Jurisdiction Case No.1868 of 2019 on 12 October, 2020 (Patna)

Jasvir Singh v. State of Punjab[40], held that "the "right to life" and "personal liberty" guaranteed in Article 21 of the Constitution of India would include the rights of convict or jail inmates for conjugal visits or artificial Insemination (in alternative)… Medical check-ups and treatment of the petitioner for infertility is an essential part of this right and without allowing husband of the petitioner to get his wife treated for such purpose the concept of this right under Article 21 of the Constitution of India shall remain only a hollow and shallow concept."

In *Neha v. State of Haryana*[41], the wife of a convicted prisoner requested the court to grant parole to her husband to have conjugal relations for procreation with an alternative prayer to allow them to procreate/maintain conjugal relation within the jail premises. The Punjab-Haryana High Court took the note of the Full Bench of Madras High Court in *Meharaj v. State*[42], wherein the Court has quite categorically opined that the right to have conjugal relations is not an absolute right and what is available to a convict is his right to obtain infertility treatment. It has gone on to state that a convicted person cannot enjoy the same rights those available to a common man because there must be a distinction between a law-abiding citizen and law-violating prisoner.

Bombay High Court in *Ashwin Bansi Sapkale v. State of Maharashtra*[43], refused to grant the parole to the convict prisoner for whom his wife requested the court. Actually, they were married in 2014 and they had one daughter from their wedlock and she was desirous of having another child from her husband. The Court followed the ratio of the Full Bench of Madras High Court in *Meharaj v. State*[44].

Before Rajasthan High Court again the issue of conjugal meet was raised in a recent case of *Nand Lal v. State*[45], wherein the convict prisoner was lodged in jail serving the life imprisonment. The Bench, consisting Hon'ble Farjand Ali and Sandeep Mehta, JJ., allowed the prisoner to be released on emergent parole for a period of fifteen days on the ground of his wife to have progeny. The court recognised the right of innocent wife who was neither involved in committing the offence nor under any punishment but her right of conjugal association and progeny is being violated only because of her husband's punishment. Recognising the religious philosophies, the Indian culture and various judicial pronouncements, the court protected right to progeny for the purpose of preservation of lineage. The court ruled that "the spouse of the prisoner is innocent and her sexual and emotional needs associated with marital lives are effected and in order to protect the same, the prisoner ought to have been awarded cohabitation period with his spouse. Thus, viewing from any angle, it can safely be concluded that the right or wish to have progeny is available to a prisoner as well subject to the peculiar facts and circumstances of each case. Simultaneously,

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[40] Supra note 32.
[41] CRWP-2526-2021 on 27 January, 2022 (Punjab-Haryana)
[42] Supra note 34.
[43] Criminal Writ Petition No.217 of 2022 on 9 March, 2022 (Bombay)
[44] Supra note 34.
[45] D.B. Criminal Writ Petition No. 10/2022 on 05 April, 2022 (Rajasthan)

it is also found apposite to hold that the spouse of the convict-prisoner cannot be deprived of his or her right to get progeny."

Spouse's Conjugal Right *versus* Prisoner's Punishment:

Historically, the institution of marriage was developed to achieve various objectives out of which the procreation and conjugal meets is of prime concern which is based on love, affection, trust and complete dedication of both the parties for each other which ultimately results in emotional attachment, personality development, family bonding and evolution of new life from their wedlock. Every person's dream is to marry and procreate through conjugal meets with lawful spouse which is completely protected under the constitutional framework. At the same time, when a person is detained in a prison because of involvement in any offence, his/her spouse, not being at any fault, is dissociated from his/her partner's companionship which finally results in violation of his/her rights guaranteed in various instruments. For such violation, in India, there is lack of statutory provisions.

"The desirability of conjugal visits has been a topic of speculation in the correctional field for a number of years. The focus of the debate to date has been primarily on correctional considerations rather than on the needs or wishes of the prisoner's spouse. The desirability of conjugal visits is a question that could and should be answered by the prisoner's spouse. To deny conjugal visits to any spouse who wants them should be considered a denial of that person's civil and human rights."[46]

There is a maxim *ubi jus ibi remedium* meaning thereby 'where there is a right, there is a remedy'. If this maxim is applied in case of a prisoners' spouse rights, particularly the right to conjugal meets, the statutory provisions are silent. In such circumstances, the responsibilities are there with judiciary which is the protector of fundamental rights of every person. The judiciary must decide the matters in the light of rights of innocent spouse of the prisoner whose rights and interests should be protected, promoted and prioritised at any cost as he/she, being completely innocent, should not be punished.

Rajasthan High Court in *Nand Lal v. State*[47], has recently held that "denial to the convict-prisoner to perform conjugal relationship with his wife more particularly for the purpose of progeny would adversely affect the rights of his wife."

Concluding Observations:

Portraying the correct position of prisoners' rights in India, the Madras High Court[48] said that-

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[46] Donald P. Schneller, "Conjugal Visitation—Prisoners's Privilege or Spouse's Right", Vol. 2: 2, 1976, *New England Journal on Criminal Law*, 165-171 at 165.
[47] Supra note 45.
[48] *M. Rajeshwari v. Additional Director General of Police (Prison), Chennai*, W.P.(MD) No. 1246 of 2021 on 04 February 2021 (Madras)

> "Quarter century passed; rights of prisoners have traversed hither to unknown path; reached mile stone in recognizing the conjugal rights of the prisoners. Still, wailing of prisoners goes unabated, getting some times louder and sometimes in silence … still miles to go."

The conditions of prisoners in prisons are abhorable and they are bound to live in unhealthy, unhygienic and adverse atmosphere wherein there is no respect for their human rights. They are being treated by the prison officials as objects having no legal entity or existence. In such situation, the protection of prisoners' rights on the part of State is meaningless and there is only one entity *i.e.* judiciary which is being looked by every weak, supressed, depressed, helpless and vulnerable person to redress his/her grievances. And then, the judiciary is expected to play proactive role for protecting and promoting the rights of prisoners and their spouses. Unexpectedly, there are conflicting judgements particularly on the prisoners' right to procreate and conjugal visits because of which there is dilemmatic situation. At the first time in India, the prisoners' conjugal visit was legally recognised by Punjab-Haryana High Court in the year 2014[49] and it was followed by it in 2019[50] also but in the year 2022[51] the same Court limited scope of this right following the Madras High Court judgement[52]. Patna High Court in 2020[53] and Rajasthan High Court in 2022[54] followed the *Jasvir Singh v. State of Punjab*[55]. Bombay High Court in 2022[56] refused to entertain claim of conjugal visit. Madras High Court in 2018[57] followed the ratio of *Jasvir Singh v. State of Punjab*[58], but in 2021[59] it completely changed the scenario by limiting the scope of this right only for specific purpose. In this situation, it is very much necessary to clarify the legal position on the part of Hon'ble Supreme Court taking into its account the rights of prisoners' spouse in the light of human rights jurisprudence.

Next, the Legislature must also come forward to safeguard the rights of prisoners and their spouses by enacting special provisions or inserting a new ground of parole or furlough in the light of views of Anthony M. Scacco, Jr.[60] expressed in 'Rape in Prison' that "sex is unquestionably the most pertinent issue to the inmate's life behind bar… There is a great need to utilize the furlough

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[49] Supra note 18.
[50] *Arun v. State of Haryana*, CWP No.3311 of 2019 on 12 April, 2019 (Punjab-Haryana)
[51] *Neha v. State of Haryana*, CRWP-2526-2021 on 27 January, 2022 (Punjab-Haryana)
[52] *Meharaj v. State,* H.C.P. (MD) No.365 of 2018 on 3 September, 2021(Madras)
[53] *Rajeeta Patel v. State of Bihar*, Criminal Writ Jurisdiction Case No.1868 of 2019 on 12 October, 2020 (Patna)
[54] *Nand Lal v. State*, D.B. Criminal Writ Petition No. 10/2022 on 05 April, 2022 (Rajasthan); Followed in: *Rahul v. State of Rajasthan*, D.B. Criminal Writ Petition No. 428/2022 on 14 October, 2022 (Rajasthan), *Ashok Kumar v. State of Rajasthan*, SOSA-549/2022 on 18 October, 2022 (Rajasthan).
[55] Supra note 32.
[56] *Ashwin Bansi Sapkale v. State of Maharashtra*, Criminal Writ Petition No.217 of 2022 on 9 March, 2022 (Bombay)
[57] *Meharaj v. State*, H.C.P. No.1837 of 2017 on 11 January, 2018 (Madras); *P.Muthumari v. Home Secretary (Prison),* H.C.P. No.2447 of 2018 on 26 November, 2018(Madras).
[58] Supra note 32.
[59] *Meharaj v. State,* H.C.P. (MD) No.365 of 2018 on 3 September, 2021(Madras)
[60] Quoted in: Supra note 18.

system in corrections. Men with record showing good behaviour should be released for weekends at home with their families and relatives". Further, there is urgent need of a national prisoner rights policy covering the all-round protection of prisoners and prioritising conjugal rights of prisoners' spouses. The conjugal meets may be effectively facilitated by constructing conjugal meets cottages in association with private enterprises within prison premises without having any economic burden on the State.

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RIGHT TO ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: ISSUES AND CHALLENGES IN INDIA

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***Abstract*:** Pollution and its destructive consequences on the modern generation have triggered the need for measures to safeguard the environment and promote sustainable development. Although governments of various states have made multiple steps to refine objectives, establish acceptable methodology, and assure sustainable development, there is no clear image of development and environmental protection plans, especially in India. Due to environmental harm, individuals and various organizations have filed complaints to international human rights authorities because environmental treaties do not contain petition procedures.In general comments and reviewing periodic state reports; these groups have also talked about environmental protection and the violation of human rights. The current paper focuses on the indiscriminate exploitation of finite natural resources. The economy-based strategy of government and private enterprises has damaged the environment to terrible extent. Illegal and poorly-equipped practices have caused global imbalance. As a signatory to the international forum's global commitments, India is obligated to keep them by preventing ill-equipped development. Every country needs economic growth. But environmental degradation makes it unworthy. This paper tries to make a nexus between protection of environment and sustainable development in India.

***Keywords*:** Human Rights, Environment, Sustainable Development, treaties, natural resources.

Introduction:

In order for humans to flourish on this planet, we must understand the concept of the 'Environment'. Environment includes the air we breathe and water which covers most of the earth surface, plants and animals around us and other organisms. Environment is significant because it influences our ability to exist on earth. It's crucial to understand and value 'environment' in daily living. In recent years, scientists have studied how humans affect the 'Environment' Air pollution, deforestation, acid rain, and other problems are damaging to the world and to humans. Laws, rules, and regulations exist to deal with the above circumstances. The government has implemented many Environmental Laws in recent decades to protect and promote the environment.[1]

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[1]https://www.nios.ac.in/media/documents/SrSec338new/338_Book2_New.pdf assessed on May 24, 2022

Human rights defend everyone's dignity. Human rights control how people live in society, with each other, and with the State, as well as the State's responsibility to them. Human rights divided into three generation right i.e. First are the civil and political rights, second are the social, economic and cultural ones and in recent years, academics have started to talk about the existence of a third generation of rights which are solidarity rights, for example the right to peace, the right to development, the right to food and to a clean environment. Since environmental preservation, economic growth, and sustainable development are inextricably intertwined in the national and international landscape, India has a special interest in all three. Human life is threatened by the loss of natural resources, industrialization and urbanization, the advancement of science and technology, and the enormous expansion in population.

Meaning and Concept of Environment:

The word "environment" is derived from the French word "Environ" which means "surrounding". It includes virtually everything that is surrounded with the human living. It is including the physical surroundings that are common to all of us, including biotic (living) factors like human beings, Plants, animals, microbes, etc. and abiotic (non-living) factors such as air, light, space, land, water etc. Environment and the organisms are two dynamic and complex components of nature. Environment regulates the life of the organisms including human beings. Human beings interact with the environment more vigorously than other living beings.2 The environment has supreme importance for an individual, and the environment helps to lead a meaningful life. The Environment (Protection) Act, 1986 defines environment "includes water, air and land and inter- relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.3The apex court in Virender Gaur's case[4] held that, the word "environment" was of broad spectrum 'which brings within its ambit hygienic atmosphere and ecological balance', free from pollution of air and water, sanitation without which life cannot be enjoyed. Thus, healthy environment is the integral facet of right to life.

Concept of Sustainable Development:

The term sustainable development was coined at the time of the Cocoyoc Declaration on Environment and Development in the early 1970's. Since than it has become a trade mark of international organization dedicated to achieve beneficial development. But for the first time, the doctrine of "Sustainable Development" was discussed in the Stockholm Declaration of 1972. Thereafter, in 1987, the World Commission on Environment and Development submitted its report, called "*Our Common Future*", which is also known as Brundtland G.H.

2.Puja Mondal, http://www.yourarticlelibrary.com/environment/meaning-definition-and-components-of-environment/6157

3 . Section 2(a) of The Environment (Protection) Act, 1986

4 . Virender Gaur v. State of Haryana, (1995) 2 SCC 577

Brundtland the prime minister of Norway chaired the commission, where in an effort was made to link economic development and environment protection. In 1992, Rio Declaration on Environment which is regarded as a significant and a milestone set a new agenda and Development codified the principle of Sustainable Development.[5]

The doctrine of 'Sustainable Development' had come to be known in 1972 in the Stockholm declaration. It had been stated in the declaration that, *"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing and he bears a solemn responsibility to protect and improve the environment for present and future generation."* But the concept was given a definite shape in a report by world commission on environment, which was known as 'our common future'. This definition emanates from Our Common Future, also known as the Brundtland Report of the World Commission on Environment and Development in 1987.

International concern on Environmental Protection: -

The "Stockholm Declaration "of 1972 is recognized as "Magna Carta of environment protection".[6] The basic feature of Declaration was to preserve and protect ecology with scientific temper and coordinating spirit. One of the principles of the declaration envisages that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment or dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generation" The Earth Summit of 1992 concerning environment, held at Rio-de-Janerio laid down a foundation for global partnership between developed and developing nations on the one hand and governmental and private agencies on the other hand to undertake the responsibility to save environment to meet present needs and future generations. The summit signed two important conventions i.e., one is "bio-diversity" and another is "on climate change".[7] The U N General Assembly called again the world Summit at Johannesburg, in 2002. The main thrust was "Sustainable Development." Once again it reaffirmed the agenda of sustainable growth and adds new impetus of global action to end poverty and protect environment.[8] The Earth Summit 2012 or Rio+20 was held in Rio de Janerio, Brazil and 172 governments and twenty thousand representative of NGO's attended the conference to address various issues concerning environment and global climate change. The import achievement of summit was an agreement on the climate change convention and agreement not to carry any activities on the land of indigenous people that would cause environmental degradation.[9] These international conferences have opened the mindset of the global leaders to work

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[5]https://www.biyanicolleges.org/concept-of-sustainable-development-an-indian-perspective/ assessed on 25/05/22

[6]. www.nrdc.org retrieved on 5.11.21

[7]. www.britannica.com retrieved on 5.11.21

[8]. https://sustainabledevelopment.un.org retrieved on 5.11.21

[9]. ibid

for sustainable development and ecological modernization. Similarly, the Paris convention ended in December 2015 has taken much hope to the home for better work to be achieved both in the periphery and in the globe.[10] These international instruments have serious bearing on the environment related issues in the global arena.

Constitution and Rights on Environment:

India has tried to take measures to maintain the ecological imbalance. The alarming implication of environmental problem was duly realized and urgent need to tackle the situation was appreciated the founding father our constitution. The Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Article 47 of the constitution which directs the State to raise the level of nutrition and the standard of living and to improve public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of intoxicating drinks and drugs which are injurious to health. Art 48-A of the constitution emphasized the importance and need for protecting our environment and to safeguard the forest and wild-life of the country. Art. 52-A imposes a fundamental duty on every citizen to protect and improve the natural environment including forests, lakes, rivers, wild-life and to have compassion for living creatures. Further the interpretation given by Supreme Court in Menaka Gandhi's case, added new dimensions to the concept of 'life and personal liberty' of the person under Article 21 of the constitution.[11] In M.C. Mehta v. Union of India[12] the Supreme Court clearly spelt out that, every person has the "right to clean environment" under Article 21. In the instant case, the court directed to close certain ternaries and viewed that closure of industries may bring unemployment and loss of revenue to the state, but life, health and ecology have greater importance for the people in India. In order to provide environmental protection and to control pollution following comprehensive central legislations have been passed by the parliament. 1. The Wildlife Protection Act- 1972, 2. The Water (prevention and control of pollution) Act of 1974, 3. The Air (Prevention and control of pollution) Act of 1981, 4. The Environment (Protection) Act – 1986, 5. The Public Liability Insurance Act – 1991, 6. The National Green Tribunal Act – 2010. The Main objectives of these Acts are to maintain or restore the wholesome environment.

Judicial Pronouncement on Environment:

The judiciary has tried to fulfil the constitutional obligations and never hesitated to issue appropriate orders, directions and writs in case of environmental pollution and ecological degradation. This is evident from a catena of cases decided by the apex court starting from the Ratlam Municipality

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10. https://unfcc.int retrieved on 5.11.21
11.Maneka Gandhi v. Union of India, AIR 1978 SC 597
12 (.1999)6 SCC 9

Case.[13] The court held that, right to life under Articl-21 means a life with dignity to be lived in a proper environment free from the danger of diseases and infection. In B.L. Wadhera v. Union of India[14] directions were issued to the Municipal Corporation of old Delhi and New Delhi, for removal of garbage and scavenging the cities. In Sachidanand Pandey v. State of West Bengal,[15] the court said whenever a problem of ecology is brought before the Court; the Court is bound to bear in mind Art. 48A and Art. 51A (g) of the Constitution. The court has invoked the public trust doctrine for giving protection to the natural resources. The court said that, these resources are held by government as trustee of the people.[16]In M.C. Mehta v. Union of India Supreme Court to granted remedial relief for a proved infringement of a fundamental right under Article 21 which includes the power to award compensation. The judgment opened a new frontier in the Indian jurisprudence by introducing a new "no fault" liability standard or absolute liability for industries engaged in hazardous activities.[17] In Sansar Chand v. state of Rajasthan case,[18] the apex court upheld the conviction of the appellant under the Wild Life Protection Act-1972 and held that, the main decline of India's wild animal and birds was organized poaching. The Supreme Court invoked the doctrine of sustainable development and observed that here is a need for the courts to strike a balance between development and environment. The court observed that sustainable development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco- system.[19] In Narmada Bachao Andolan v. Union of India and Ors[20], the Supreme Court of India upheld that "Water is the basic need for the survival of human beings and is part of the right to life and human rights as enshrined in Article 21 of the Constitution of India and the right to healthy environment and to sustainable development are fundamental human rights implicit in the right to life. It has allowed constructing dam on Narmada River along with the rehabilitation measures for displaced persons.

The Constitution of India and Concept of Sustainable Development:

Indian constitution envisages specific provisions for the protection and improvement of environment. India also has credit to be the first country which made provisions for the protection and improvement of environment in its Constitution. By way of 42nd amendment to the Constitution in year 1976, Article 48- A which specifically deals with Environment protection and its improvements in several environmental cases the Indian courts also guided by the language of this Article. Article 51A (g) casts duty on the citizens forprotection of environment. Schedule VII containing the three lists clearly lays down various areas relating to environment protection upon which the centre

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[13] .Ratlam Municipality v. Vardhi Chand, AIR SC 1622
[14]. AIR 1996 SC 2969
[15] . AIR 1987 SC 1109,
[16]. Association for Environment Protection v. state of Kerala, AIR 2013 SC 2500.
[17] .AIR 1987 SC 965
[18]. (2010) 10SCC 604
[19]*Vellore Citizen's Welfare Forum v. Union of India,*AIR 1996 5 SCC 647
[20]. AIR 2005 SC 3136

and states can legislate. As a result of which the Indian Parliament enacted various legislations which deal with environment protection and put the idea on track of sustainable development. Indian Parliament also passed various laws effecting and regulating the environmental issues. Legislative enactments were always with the principles of economic, social security and sustainable development.

Role of Indian Judiciary visa-vice sustainable development:

It will be analysed how the Supreme Court has used the Constitution's environmental provisions, particularly Article 21, to provide environmental justice. As noted by Justice Kripal, "Article 142 gave the Supreme Court substantial authority to shape its rulings in order to achieve total justice." By declaring that environmental deterioration in a variety of ways breaches constitutional provisions, it has taken the lead in the Indian environmental law system. Article 32 of the Constitution of India is one of the most inventive aspects of the Constitution since it grants citizens the authority to enforce the basic rights of others. Supreme Court rulings will be applied to all lower courts in India (Article 141 of the Constitution). Ecological balance is essential to human well-being and has been made possible by the judicial activism and foresight of the courts of India, particularly the Supreme Court and other high courts. A new jurisprudence and dimension to environmental protection have been introduced by these court decisions by embracing the idea of Sustainable Development. Following are some of the judicial pronouncements relating to sustainable development:

In *T.N. GodavaramanThirumulpad v. Union of India*,[21] the Supreme Court said "as a matter of preface, we may state that adherence to the principle of Sustainable Development is now a constitutional requirement. How much damage to the environment and ecology has got to be decided on the facts of each case."

In *Indian Council of Enviro-Legal Action v. Union of India*[22], the Apex Court held: "*while economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments*". Hence, importance has been given both to development and environment and the quest is to maintain a fine balance between environment and economic development.

The first case that can be discussed in respect to the Courts interpretation of Article 21 is MC Mehta v. Union of India or the Oleum Gas Leak Case. Here the apex Court declare that, "Right to life means a life of dignity to be lived in proper environment free from danger of diseases or infections. In this case Supreme Court established the rule of absolute liability and held that if any damage is caused due to hazardous or dangerous activity than the sufferer is

[21](1997) 2 SCC 267
[22]1996 AIR 1446, 1996 SCC (3) 212

liable to be compensated. Further, the Court also observed that the claim for compensation under Article 21 is sustainable. In respect to Article 32 the Court observed that the ambit of Article 32 is extremely broad and it allows the Courts to force new remedies and to formulae new strategies to enforce fundamental right

In *Bombay Dyeing and Manufacturing Co. Ltd v. Bombay Environmental Action Group*[23], "The Supreme Court observed that with major threats to environment such as climate change, global warming etc.; the need to protect the environment has become priority, at the same time it is also necessary to promote development, so much so that it has become the most significant and local point of environment legislation and judicial decision relating to the same."

Similarly, the apex court in *Amarnath Shrine, in Re vs. Union of India and Others***,** explained that the doctrine of Sustainable Development and precautionary principle have been applied where development was necessary, but not at the cost of environment" appropriate balance between the various activities of the states very foundation of socio- economic security and proper environment of the right to life. "And this balance to be made by the courts to ensure the protection of environment and forests.

Issues and Challenges in India:

"The United Nations has outlined a strategy for achieving economic, social, and environmental sustainability in their 2030 Agenda for Sustainable Development. This strategy offers the international community with a plan of action to achieve the balance that is envisioned by the UN. The 2030 Agenda offers industry an important role to play in the efforts to achieve the Sustainable Development Goals (SDGs), despite the fact that India has taken a strategic lead in the pursuit of attaining the Sustainable Development Goals (SDGs)." But irrespective of steps taken by government India still have its issues and challenges to protect the environment which has been described below-

(a) Degrading Air quality Index
(b) Growing Water Scarcity
(c) Lack of waste management
(d) Rampant Environmental Degradation
(e) Urbanization
(f) Global Warming
(g) Loss of Resilience in Ecosystem
(h) Loss of Biodiversity
(i) Heavy Industrialization
(j) Use of heavy plastic

"The above issues and challenges are in front of India to achieve the goal 2030. Also, the government has started many programmes to eradicate the above problem i.e., Swachh Bharat Mission, Green Skill development

[23](2005) 5 SCC 61

Programme, Namami Ganga Programme, National Mission for Green India, National Riven conservation Programme, Conservation of Natural Resource & Eco-System etc." Government try his best and lunching programmes in every day basis to save the environment and plan for sustainable development, at the same time Judiciary also deciding thousands of cases and providing guidelines, Executives implements the laws and lunches awareness programme in all over India but it is still difficult to breath in the Air, it is still difficult to drink clean water, it is still difficult to live in clean environment. When we people can't sustain in today's environmental condition then how we think for sustainable development. It is really an alaramic movement to save environment and every person need personal contribution to achieve the goal 2030.

Concluding Observations:

A lot has been done legally and judicially to protect environment, but still, we are lacking far behind from our goal. Preservation and protection of the environment and keeping the ecological balance unaffected is a mission which is not only for Governments and judiciary but also for every citizen of India, it is a pious, social, moral and legal obligation on every Indian citizen, it is also their fundamental duty as enshrined in Article 51 A (g) of the Indian Constitution. It is an opportunity to come together and achieve the goal of" Sustainable Development "as envisaged by the U.N. Millennium Goals of 2000and declared by the Rio de Janeiro- Submit on Sustainable Development (1992,2012), the Johannesburg Conference on Sustainable Development (2002).

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EMERGING PREFERENCE TO THE USE OF THE WORD 'COVID' FOR TRADEMARK IN INDIA

Dr. Ranjana Ferrao[1]

Abstract-*The statutory definition of trademark in any legislation of any country across the globe is that the trademark is static. In modern day and age companies are constantly making changes and variation of their mark. This addition is not a new trademark but a mere addendum. Trademark fluidity is not new. But this has specially increased during the pandemic. Changing a trademark to keep up with social situations makes the mark more attractive to the younger generation. For example, Google is a worldwide trademark which keeps changing its doodle almost every day. There is an extensive use of the work 'Covid,' 'social distancing,' 'safe corona' by companies. Such acts may mislead the consumers. The need of the hour in the fast world is to protect the trademark and the consumer. The consumer must not be misled and fooled. The cost would be disastrous. The recent trend used by proprietors is expanding the boundaries of a trademark which is leading to brand fetishism and abuse of economic power of the brand. This Article will dwell on issues like Passing Off, Dilution, disparagement, comparative advertisements, fluid and series trademarks.*

***Keywords*:** Infringement, Covid- 19, Disparagement.

Introduction:

COVID-19 is a disease caused by a new strain of coronavirus. 'CO' stands for corona, 'VI' for virus, and 'D' for disease. Covid-19 is an infectious disease which was declared a global pandemic by the World Health Organization.'[2] Most countries declared lockdowns. Need for essentials products and goods led companies to adjust themselves to new ways. The pandemic flooded the market with 'covid' related products. From masks, sanitizers, handwash, surface disinfectant, article disinfectant a range of products are available. Companies began dressing their products in new 'avatars'. Eye catching trademarks were used to entice customers.

"Fluid trademarks" as the name suggests, the 'mark' will keep changing with time. Currently companies are using a host of fluid trademarks like the product cover has a picture of a 'mask' or imparts a message of the need for social distancing. This is needed as it will add an element of freshness. 'Fluid Trademarks' have become a marketing tool for companies. Fluid trademarks help consumers know what is trending and reduce their search time. Fluid Trademarks are not new they were in existence; however, the Covid-19 pandemic had bought them back in vogue. Fluid trademark may not be in 'use' after sometime when the current situation may not need them. 'Fluid trademark' may be modified and it may be difficult to identify the original mark. This could lead to cancelation of the trademark for failure to use the originally registered mark. It could create a situation where the identity of the original 'mark' is lost.

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[2] Coronavirus available at https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited on 5th October, 2020)

Trademarks function as a source identifier. The proprietor keeps changing his trademark though they may be minor changes to suit the social needs of the time would consumers be able to identify such trademarks. The proprietor must also use the mark. The Registrar of trademark has power to remove a trademark if not used.[3] Covid- 19 has given rise to deception with the use of the word 'CORONA.' Use of words like 'COVID-RELIEF', 'NOCORONA' 'CORONA SAFE' 'ANTI- CORONA' and 'CORONAVIRUS PREVENTIVE' are in vogue. Such names are usually used for 'pharmaceutical products, sanitary preparation for medicinal purposes.' This would lead the consumer to believe that maybe these medicines prevent the person from contacting the Covid-19 virus. Such marks if registered will deceive and confuse the public.

Deception and confusion in the mind of the public is a ground for removal of a registered trademark from the Register of Trademarks. Those companies who had registered the trademark 'CORONA' years back may be entitled to a remedy under infringement of trademark. Fluid trademarks using the 'Corona' related messages and use of the mark 'CORONA' has increased trademark litigation in India. This Article will dwell on issues like Passing Off, Dilution, disparagement, comparative advertisements, fluid and series trademarks.

Defining Trade Marks:

India is a signatory to the TRIPS Agreement. A trademark is defined as, 'any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings, must be eligible for registration as a trademark, provided that it is visually perceptible. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, must be eligible for registration as trademarks.[4]' The Trademark Act, 1999 defines mark as-

> '[i]ncludes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.'[5]

"Trade mark" is defined as;

> '[a] mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and— (i) in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and (ii) in relation to other provisions

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[3] *Fluid Trademarks: Keeping Them Watertight*, Trademarks and Brands Online (Jan. 1, 2014), https://www.trademarksandbrandsonline.com/article/fluid-trademarks-keepng-them-watertight.

[4] Article 15, TRIPS Agreement

[5] Section 2(m)

> of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark.[6]'
>
> '(a) A statement of the goods or services in relation to which they are respectively used or proposed to be used; or
> (b) statement of number, price, quality or names of places; or
> (c) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark; or
> (d) colour the proprietor may register those trademarks; they may be registered as a series in one registration.'[7]

Function and Advantages of Trademark:

In order to register a trademark, there must be a sign. The sign must be distinctive. The trademark may provide consumers information about the quality of the product they wish to buy. In the year 1868 a Paris Court held 'Trademark is a distinctive sign of a goods serving to guarantee its quality, reputation and origin.'[8] Trademark may not serve as a guarantee for the quality of the product bearing it. The quality could depend on the function and origin. Thus, it can be safely inferred that the quality function is inferred from the distinctive function of the trademark.[9]

Trademark are made widely known to the consumers. The trademark starts acquiring reputation with the consumers. People are mesmerized into buying a product based on its name. This trademark informs the consumers about the quality of the product. This reputation can travel even beyond the country of origin. This transverses into fame.[10] A trademark is thus translated into the buyer's confidence. It has a magnetic effect on the business. The function of trademark is to reduce consumer search cost. The need of the hour is protecting products and consumer interest and helping consumers to identify the source. The trend used by proprietors is to expand the boundaries of marks for a trademark which is leading to brand fetishism and abuse of economic power of the brand.

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[6] Section 2(1)(zb)
[7] Section 15(3) Trademark Act, 1999
[8] CA Paris 16th December, 1868
[9] D.Brandt, *La protection elargiede la marque de haute renomme audela des produits identiques et similaires. Etut de droit compare*, Librairie Droz Geneva 1985 pp117-118
[10] M.Bohaczewski, *Special protection of Trademarks with a Reputation under European Union Law* , Kluwer Law International B.V, The Netherlands, 2020

Infringement of Trademark:

Traders are encouraged to register their trademark. When a trader registers his trademark and others copy such a trademark. The aggrieved trader could have a right to institute a suit for infringement. The trader copying a trademark must use a deceptively similar mark. In such situations it may be proved that the 'essential elements' of the trademark are copied. Such a 'copied mark' must use in 'the course of trade' and must be printed on all promotional material.

1. Confusion and deception to Public by using the word 'Corona'

Changing the trademarks enables companies to 'energize their brands and connect with consumers.' Brand owners must be cautious when making changes to their trademark as there is a real danger of confusing consumers, diluting the trademark or even turning it into a generic mark and thus losing the much-needed protection.

Section 9(2)(a) of the Trademark Act, 1999 stipulates that '*a mark shall not be registered as a trade mark if it is of such nature as to deceive the public or cause confusion.'* The Registrar of Trademarks may prohibit the registration of a 'mark' which deceives the public. A trader may file a suit for infringement if the opponent's 'mark' causes confusion. 'Confusion' may occur when;

'a) Marks are identical and goods and services are identical.

b) Marks similar and goods or services identical or similar.

c) Marks identical and goods or services identical.[11]'

In *Reckitt Benckiser (India) Pvt. Ltd. V. Mohit Petrochemicalspvt. Ltd. & Another*[12] The plaintiff is the owner of the well-known product. "Dettol". 'Dettol' is a soap'. The Defendant launched a hand sanitizer with the name 'Devtol.'The defendant adopted similar colour scheme and get up of the plaintiffs. The Delhi High Court directed the defendants to pay Rs. 1,00,000/- to the Juvenile Justice Fund.

The Trademark Registry had granted registration to the trademark 'N95.' is a particulate-filtering facepiece respirator. The WHO has recommended the use of N-95 respirator during the ongoing pandemic. In *Sasoon Fab International Pvt. Ltd. v. Sanjay Garg*[13] The registration granted to 'N95' by the Trade Mark Registry was challenged. The Intellectual Property Rights Appellate Board considered 'N95' to be a generic term. Besides the petitioner's mask did not perform the functions an N-95 mask would do. Concerned with the fake use of the 'N-95' designation the IPAB prohibited the sale of trademark 'Sasoon' and use of 'N-95' on the

[11] See Section 29, Trademarks Act, 1999
[12] CS(COMM)No.141/2020 & I.A.Nos.4034-37/2020
[13] ORA/171/2020/TM/Del

packaging of its masks. The Intellectual Property Rights Appellate Board discouraged dishonesty.

The vaccine available in India have a common suffix 'covi.' Cutis Biotech filed a Suit against Serum Institute of India (SII) restraining them from using the word 'Covishield' for their vaccine. They claimed they were the first company to file for registration of the trademark 'Covishield.' They were also the first ones to use 'Covishield' for their sanitizers and disinfectant. The Bombay High Court in *Cutis Biotech.v. Serum Institute of India Limited*[14] upheld the test which is applied in passing off matters and held;

> 'That 'Covishield' is a vaccine to counter Coronavirus is now widely known. A temporary injunction directing Serum Institute to discontinue the use of mark 'Covishield' for its vaccine will cause confusion and disruption in the Vaccine administration programme of the State. Prima facie evidence to show that SII had adopted the name prior to Cutis Biotech and that SII has continued using the name without a break.'

2. Comparative Advertising

Comparison lies at the root of modern advertising.[15] Most companies indulge in comparing their products with another company. This practise helps the consumer and the trader. It helps a new trader to establish itself in the market in riding on the rival trader's success. It also serves as a repository of information about alternative brands, products and services. It helps the consumer and encourages them to take a more informed decision. 'A tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue.'[16]Advertising and social media have made brands living organisms. Trademarks likely to cause confusion even on social media may be removed. In *Facebook Inc. Vs. Surinder Malik*[17], the Hon'ble High Court directed social media platforms like Facebook and Instagram to remove the trademark 'DA MILANO' from its platform. The removal was initiated under Information Technology (Intermediaries Guidelines) Rules, 2011.[18]

An advertisement is 'commercial speech and must be protected under Article 19(1)(a) of the Constitution of India.[19] In *Reckitt and Colman of India Limited.v. Kiwi T.T. K.L* the Delhi High Court opined that a 'manufacturer may make statements of his goods and in this process, he may puff up his goods. This will not permit other manufacturers to institute legal proceedings against them.' The courts on numerous occasions have held advertisements are trademarks. The

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[14] Appeal Order No. 53 of 2021
[15] Cornish, W., *'Intellectual Property'* Sweet and Maxwell Limited, London(4th Edn., Page 656).
[16] *Reckitt & Colman of India Ltd. v. M.P. Ramchandran and Anr.*, 1999 (19) PTC 741
[17] [CM(M) 1263/2019]
[18] Rule 3(4)
[19] *Dabur India Ltd. v. Colortek Meghalaya Pvt. Ltd* 2010 SC Online Del 391

courts have also restrained companies from airing wrong or disparaging advertisements.

In *Gujarat Co-Operative Milk Society v. Hindustan Unilever Ltd*[20] Amul aired an advertisement. In its commercial Amul had compared ice-creams with frozen desserts. Amul had stated that their ice cream contained '100% milk whereas frozen desserts are manufactured using vanaspati i.e. hydrogenated vegetable oil.' Kwality claimed that the 'products are manufactured using edible vegetable oil and not vanaspati and that both ice-creams and frozen desserts contains 90% milk.' The Bombay High Court prohibited Amul 'from publishing any other advertisement which were similar to Kwality' s products. Amul filed an Appeal. The Court of Appeal held that Amul was using vanaspati which had harmful effects on health. The court held Amul guilty of using negative qualities and publishing false facts which prevented the consumers from buying frozen desserts. The court considered such acts to be acts of disparagement. The Court allowed Amul to sell its product only after the disparaging advertisement was removed.

A trader can institute a suit for infringement when the opponent makes an unauthorized advertisement.' The advertisement may, *'Take unfair advantage and may be contrary to honest practise in industrial commercial matters. The advertisement may be detriment to its distinctive character. The advertisement may affect the reputation of the trademark'.*[21]The trader may 'compare one or more material, relevant, verifiable and representative feature of the goods and services in question which may include price.[22]' Such a practise would be an 'honest practise.' Companies may also indulge in 'puffery' in their advertisement as long 'as the product of a competitor was not slandered in any manner.[23]'

3. Disparagement

Disparagement means using false claims or statements about the competitor. The New International Websters' Comprehensive Dictionary defines disparage/disparagement to mean, "to speak of slighting, undervalue, to bring discredit or dishonor upon, the act of depreciating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation. " The Concise Oxford Dictionary defines disparage as under, to bring dis-credit on, slighting of and depreciate."

The trader cannot 'denigrate the product of the appellant nor is the market place a suitable substitute for injunction.' The Delhi High Court[24] has laid down factors in deciding disparagement:

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[20] Appeal No.340 of 2017
[21] Section 29(8)
[22] *Havells India Ltd and Anr Vs. Amritanshu Khaitan and Ors*
[23] *Glaxo Smith Kline Consumer Health Care Limited v. Heinz India Private Limited and Ors*
[24] *Dabur India Ltd. v. M/S Colortek Meghalaya Pvt. Ltd*

> 'Intent of the commercial, (ii) Manner of the commercial, and (iii) Story line of the commercial and the message sought to be conveyed. These factors, we would like to amplify or restate them in the following terms (1) the intent of the advertisement this can be understood from its story line and the message sought to be conveyed. (2) The overall effect of the advertisement does it promote the advertiser's product or does it disparage or denigrate a rival product? While promoting its product, the advertiser may, while comparing it with a rival or a competing product, make an unfavourable comparison but that might not necessarily affect the story line and message of the advertised product or have that as its overall effect. (3) The manner of advertising is the comparison by and large truthful or does it falsely denigrate or disparage a rival product? While truthful disparagement is permissible, untruthful disparagement is not permissible.'

In *Cerviciria Modelo De Mexico, S. De R.L. De C.V .v. Whiskin Spirits Pvt Limited*[25] the plaintiffs were manufacturers of beer. They had registered their trademark 'CORONA.' The defendants made an advertisement which linked the plaintiff's product with 'Corona Virus.' The Delhi High Court held that the defendant had committed an act of 'disparagment.' The defendant was prohibited from airing the advertisement. Recently Hindustan Unilever Limited filed a suit against Reckitt Benckiser for 'disparagement and infringement of trademark and copyright.' They claimed that an advertisement of the product 'Dettol' made claims that the product 'Lifebuoy' was not capable of dealing with Covid-19.[26]The Bombay High Court directed Reckitt Banckiser to take down the advertisement.

4. Dilution of Trademark

If customers start associating the trademark with a new and different source this could deceive the customers. The rights of the 'prior user' of the trademark get affected. The link between the plaintiff's registered trademark and the defendant similar mark gets blurred. Ultimately the commercial value of the trademark will get affected.[27]The Trademark Act, 1999 recognizes the doctrine of 'dilution'. Dilution of a trademark occurs when there is:

> 'Confusion' which is caused when the '*mark is identical or similar, and goods or services are not similar*.' The trademark must have considerable reputation in India. There must be use of the mark

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[25] CS(COMM)No.186/2020 and I.A Nos 4705-08/2020

[26] N.Kashyab, Dettol' Ad Showing 'Lifebuoy' Ineffective For COVID19 To Be Suspended After HUL Moves Bombay HC, *Live Law* , dated 23rd March, 2020 available at https://www.livelaw.in/news-updates/nagpur-court-sends-sameet-thakkar-to-police-custody-till-october-30-he-was-booked-for-tweets-against-cm-uddhav-thackeray-son-aditya-thackeray-165033?infinitescroll=1

[27] *Catepillar Inc .v. Mehtab Ahmed* 2002 (25) PTC 440 (Del)

> which will take unfair advantage or will be detriment to the repute of the registered trademark.[28]'

> 'Mark is used as a trade name or part of trade name or name of business which deals with the goods and services of a registered trademark.[29]'

A trader may have economic interest in the use of his mark outside the field. A 'mark' used by a trader is his authentic seal. The mark when attached to goods ascertain the goodwill of his name. If another trader uses the same 'mark' he borrows the owner's reputation. This is an injury, even though the borrower does not tarnish the image or even lower the sales. Any such use is unlawful.[30]

In *M/s.Arudra Engineering Private Limited.v. M/s.Pathanjali Ayurved Limited.*[31] The petitioner had registered 'CORONIL-92B' in the year 1993. This trademark was registered for 'product of Acid inhibitor for industrial cleaning, chemical preparations for industrial use.'The defendants had launched a medicine called 'Coronil.' 'Coronil' was a tablet. The petitioner had renewed its registration of its trademark. The Madras High Court restrained the defendant was using the name 'Coronil.'

Legality of Fluid Trademarks:

Fluid marks come in many forms. Some involve simply ornamenting while the essential characteristics of the mark remains constant. Three dimensional containers are very common. A series trademark may be one mark which in 'black and white and the others in colour or where the series is for a number of trade marks in different colours.'[32] The TRIPS Agreement does not define fluid trademarks. In India Fluid trademarks are registered as Series trademark. Some companies may change backgrounds or apply moving images or change designs. A trademark once registered, Section 15 of the Trademark Act, 1999 does not allow the proprietor to update the trademark application to a series trademark. Section 15 does not identify the nature of trademarks. Thus, in India series trademarks do not account for fluid trademarks. Hence currently there is no appropriate definition for fluid trademark.

The pandemic has increased a trend of traders registering series and fluid trademarks. A series trademarks is when several trademarks are registered in respect of the same or similar goods or services the marks resemble each other in their material particulars, they can differ. The marks must not affect their identity.

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[28] Section 29(4)
[29] Section 29(5)
[30] *Yale Electric Corp. v. Robertson* 26 F.2d 972 (2d Cir. 1928).
[31] O.A.No.258 of 2020 in C.S.No.163 of 2020
[32] Office of the Controller General of Patents, Designs and Trademarks, A draft Manual of Trademark Practise and Procedure available at http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf

The marks distinctive elements must be maintained. Some elements may receive a higher protection by registering them in one application. The test is whether the marks in a series are substantially different from one another. If the identity has changed the Controller General of Patents, Designs and Trademarks will refuse to register the mark.[33]The mark must identify with the same source. There are many ways in which series trademarks are used to build an image and gain popularity for a brand.[34] If the mark uses words then the proprietor may protect the trade dress. For example, McDonald's uses a series of 'Mc' word marks. Examples of the McDonald's family of trademarks include 'McDonald's,' McDonalds Hamburgers,' 'Egg McMuffin,' 'McChicken,' 'McDonuts,' 'Big Mac,' 'McPizza,' 'McCafe,' 'Chicken McNuggets,' 'McDouble' 'Chicken McBites' and many others'.[35]

In *Glaxo Group Limited v Union of India, Voltas Limited and Others*[36] the plaintiff had filed an application for registering its trade mark 'Volmax' in Class 5 of Schedule I of the Trade Mark Act 1999. Class 5 permits registrations in 'pharmaceutical substances and preparations, biological food products.' The Registrar refused to grant registration to the trademark 'Volmax.'An Appeal was filed before the IPAB. The IPAB held;

> "the house name VOLTAS was totally different from the Appellant's mark `VOLMAX" and therefore there could not be any confusion in the mind of the purchaser or the trader. Apart from the fact that the marks VOLMAX and VOLTAS were not deceptively similar, the goods in respect of which they were to be used were totally different."

The Delhi High Court set aside the order of the IPAB. In *Modi-Mundipharma Pvt. Limited vs. Preet International Pvt. Ltd. and others*[37], the plaintiff had filed for registration of its trademark 'Cotin.' The plaintiff was the owner of series trademarks 'Continus, Dilcontin, Nitrocontin, Indicontin, Arcontin, Bucontin, Corbucontin, Diucontin-K, Fecontin-F.' The word "Contin" was a common feature of the mark. M/s Eubiotics Pharmaceuticals was using the trademark 'Fecotin.' The Delhi High Court held; 'FECONTIN-F' as well as the family/series mark CONTIN are deceptively similar to that of the plaintiff."

Slogans During Covid- 19

A Slogan is recognized as a "mark. A slogan can be represented graphically. Therefore, slogans may be registered as trademark by fulfilling

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[33] R. Narula, Ma.Varshney, India: Retaining freshness with fluid marks and slogans, Dated 31st October, 2015 available at https://www.worldtrademarkreview.com/india-retaining-freshness-fluid-marks-and-slogans

[34] D. Rai, Fluid Trademarks : An Alter Ego for Brands, SpicyIP dated August 7, 2020 available at https://spicyip.com/2020/08/fluid-trademarks-an-alter-ego-for-brands.html

[35] R. Selvam, Trademark Series, Concept and Position in India, dated March 11, 2013 available at https://selvams.com/blog/trademark-series-concept-and-position-in-india/

[36] W.P.(C) 9478/2006 & CM 7072/2006

[37] I.A. No. 12593/2007 in CS (OS) NO.2176/2007

formalities as prescribed under Section 18 of the Trademark Act, 1999.[38] To qualify for registration a slogan must be distinctive and should not use generic words. In P*epsi Co. Inc. and Anr v. Hindustan Coca Cola and Ors*[39], the Delhi High Court held 'distinctive slogans' can be protected under the Trademark Act, 1999 and not under the Copyright Act, 1957.

In India Amul launched its hand drawn cartoon of a girl which has become the brand icon and its identity. First launched in 1960 the advertisements of Amul has complete 70 years of existence. The advertisements change according to national news of India. Amul appealed for cleanliness and had a slogan which stated; 'Better safe than sorry, Amul always safe.' Amul also had a slogan called '*Wuhan se yahan le aaye… Amul homecoming snack*.' In the lockdown days Amul coined a slogan, 'Home for breakfast, lunch and dinner Amul so are we.' Amul reacted to the news of the time and had a slogan '*MBBS: Makan Bole Bahut Shykriya Amul in sickness and in health*.' Amul welcomed Amitabh Bachan home after his recovering from Covid-19 with tis slogan 'AB beats C, Amul homecoming gift.' Though Amul changes its advertisements, yet the consumer can identify the brand each time. Fluid trademarks have become the need of the hour for companies.

A number of companies have changed their slogans during the pandemic. Coca Cola has a slogan tilted 'staying apart is the best way to stay united.' McDonald's famous golden M is split into two golden arches with a slight space between them. Subway has a slogan 'Stay safe.' Earlier the logo of Mercedes Benz the star would join the circle now it is at a distance from the circle. Mercedes using a tag line 'Thank you for keeping distance.' Audi has a slogan 'keep your distance.' Kappa had a logo with men and women sitting with their backs together. Now the men and women has been separated. Zomato used white lettering of a word mark on a red background. Now Zomato shows a picture of a mask. It also uses the slogan 'Be a Mask Kalandar.' Make my trip used work mark of Make my trip in white lettering on a red background. Now on the word mark 'My' is covered with a mask. It has a slogan 'making India safer and shows a picture of a suitcase which reads My safe trip pledge.'

Burger King uses the tag line 'Stay home of the Whopper.' Master card had two circles one red and yellow overlapping now the two red and yellow coloured circles are at a distance. OYO has changed his trademark. On the letter O they have incorporated a picture of sanitizer. Starbucks famous mermaid logo is now seen wearing a mask. Fevicol has a interesting tagline 'Kal ke mazboot jod ke liye. Aaj Thoodi doori maintain korona.' KFC had words together now there is distance between the letters K, F and C. Popular tea chain Chaayos has spaced the letters with the Tag Line 'social distancing is interesting.' The letter M of e-commerce 'mytra' had been disconnected. HDFC bank had a red quare and inside it a smaller blue square. Now the red square is disconnected and blue square is distant. It uses the words 'Maintaining social distance yet always near you 24x7.' Nyke used

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[38]K.M.Janhavi, Trademark Registration of Slogans, October 21, 2019 available at https://www.intepat.com/blog/trademark/trademark-registration-slogans/

[39] 2003 (27) PTC 305 Del

the slogan of 'Just Do It' now it has been changed to 'Just don't do it.' LinkedIn's logo was changed to LockedIn to depict the fact that most people are confined to their homes.

Concluding Observations:

Companies using words like 'Corona safe, covid cure, no corona' will mislead the consumers into believing that that the product is effective against Covid-19. Excessive use of such words will lead to the dilution of the mark. Use of similar trademarks and extensive use of the word mark Corona has resulted in "knock-off" brands in the market. Excessive use of the mark may dilute the mark. The companies may use a number of marks to suit the time but later stop using these various variations. This could result in abandonment of the mark. If the proprietor has not applied for registration of trademark and its variations and another trader uses his mark, he is left with only remedy under the law of passing off. Consumers may come up with their own versions of trademarks and use them on their personal blogs, websites and social media profiles. This would give third parties the right to use a company's trademarks. Funny jokes on the brand could tarnish the image of the brand. These are the new challenges to trademarks in the marketplace.

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ROLE OF SOCIAL MEDIA IN PARTICIPATORY DEMOCRACY: RIGHT TO PRIVACY

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Abstract-The social media has become a promising material for knowledge and personal liberty. Understanding comes from data, and knowledge confers authority. Media freedom has become a long-standing battle in global history. Media freedom is an essential component of liberty of speech and expression. Luckily, we live in a time where data can be accessed with just a tap. In an environment where individuals have the freedom to communicate oneself openly, we can obtain greater knowledge, better government, and better protection for liberty. In order to create quite an atmosphere, no analogue to press freedom could be found. The press's freedom is not an exception to the principle that no right can be obtained without performing one's duty. The research provided the important point that the speech and expression rights guaranteed to the social media must be practiced according to the level of personal data that is revealed and thus rely on the way the audience will perceive this material, which varies between locations or over period. This paper deals with the freedom of speech and expression of social media but there are some restrictions on the other side but they should be reasonable.

Keywords-Media, Freedom of speech and expression, Right to privacy.

Introduction:

According to Article 19(1)[1], the right to free speech and expression is vital. The liberty of expression and speech doesn't really apply to all languages. There would be anarchy and chaos as a result. In order to protect the country's independence and integrity, Article 19(2)[2] of the Indian Constitution requires reasonable constraints on the application of the power granted by the aforementioned sub - clause. The administration prefers that freedom of press be tied to societal and basic obligations as well as the duty to report with objectivity. The freedom to free speech and expression is guaranteed to all people under Article 19(1)(a) of the Indian Constitution. It is generally widely accepted that Article 19(1) involves the term" expression & speech" also refers to freedom of press. The liberty of the press entails independence from government intervention that can affect the publication's editorial and financial decisions. Some limitations outlined in Article 19(2) of the Indian Constitution apply to Article 19(1) (a) of the Indian Constitution.

A person's ability to be alone, to organize things around them, or to feel put off from others permits them to express oneself more freely. In the midst of people and culture the boundaries and material of what is evaluated are totally opposite, but they share recurring characteristics. Extraordinary usually means that a thing is sensitive or remarkable to them on an innate level when it is

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[1] Article 19(1) of the Indian Constitution

[2] Article 19(2) of the Indian Constitution

personal to a being. The concept of security (secrecy), which might include the notion of appropriate usage as well as the guarding of knowledge, somewhat overlaps with the privacy concept. The safeguarding of one's privacy might also take the shape of physical honesty. The privacy right and the freedom of the media are two distinct but equally important rights that are ingrained in each of these bodies. Thoughts and emotions help shape policies and create fresh concepts for the political structure. It also promotes economic stability and prevents the misuse of power by government authorities. Freedom of the press and the privacy right also entail liberty to disseminate fresh concepts by using the media to publish awareness. Media dissemination is essential because it contains crucial data that would otherwise remain undiscovered.

Role of Media:

Ever since beginning of life on Earth, media has played an important role; even animals use their own ways of communicating. They used it to call out to one another for assistance if they were threatened. It's been utilized for centuries in a variety of eras in a variety of techniques, and its significance in meeting people's requirements is only increasing. People can only communicate with each other across great distances because of the press and its usefulness. The philosophy of "We are also far yet remote" emerged with the development of the press. A suitable control must be created on press in to avoid chaos, and much more independence must be given to liberty of the press in to make it possible for the disclosure of much more information relevant to the public's access to information. The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948. The charter sought to protect each person's dignity and integrity while bearing in mind that the foundation for global harmony and peace lies in moral morality and feelings. The greatest support for civil rights is believed to be knowledge of freedoms and rights and concord and goodwill between countries encourage good development in regards to trade, warfare, etc.[3]

Free press, according to Justice Palkhivala, is fundamental, comparable to the need for organs within the body. It is the primary cause of its conditional survival. Free press is crucial for the functioning of democracy and restrictions create conflicts on it.[4]

The writers of the Indian Constitution made free speech a need while taking the needs of the community and country into consideration. The basic right to free speech and opinion, which is infused with press freedom, shapes democratic understanding. Media is granted the same rights as citizens in order to preserve popular sentiment and thinking. As a result, it is necessary to establish strong ties between the Government and the press as the press plays a

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[3] Universal Declaration of Human Rights; available at http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf;assesed on 16/10/2022 at 10:15 am IST

[4] Soli J. Sorabjee; “Palkhivala and The Constitution of India”; (2003) 4 SCC (Jour) 33

crucial role in human rights protection.[5] Ethics codes and attitude between them have inherent issues that, if expressed, might lead to conflicts. According to Article 19(2) of the Indian Constitution, reasonable limitations have been put in place to put an end to these conflicts.[6]

Expression is a luxury that only humans possess. In many liberal nations all over the world, free speech and expression has been acknowledged as an unalienable fundamental right. Whether it's the Magna Carta of Human Rights, the First Amendment of the American Constitution, the Universal Declaration of Human Rights, or Article 19(1)(a) of the Indian Constitution, speech and expression freedom has always been seen as a fundamental human right.[7]

Novels, magazines, and newspaper become appropriate communication tools with the development of traditional media. The written versions of the Bhagavad Gita, the Quran, as well as the New Testament all had an impact on people's religious beliefs and practices. Such religious literature and texts influenced their private lives by moulding their behavior, personality, and religious practices.

Two crucial cornerstones of any republic are the courts and the media. Both play a critical and vital role in safeguarding the rule of law as well as the democratic ideology, which are both necessary for the efficient operation of the management of impartial. They are there to support one another rather than to replace one another. They are linked inextricably. While implementing its liberty of speech and opinion, the press must ensure that each person's privacy rights is respected. Whereas the public is entitled to information, a suspected or someone who has been charged is also entitled to right to protection and defence, and this rights cannot be infringed. It would be contrary to Article 21 of the Indian Constitution to surrender his foundation of innocent on the altar of press freedom of expression and speech. The management of neutrality must be prioritized over press freedom of opinion and expression if the law's rule is to be safeguarded and developed.

Definition and Significance of Press Freedom:

Freedom to speak freely one's thoughts and opinions through writing, speaking, as well as other kinds of communications, as long as one does so without defaming the reputation of anyone else or making unclear or misleading claims. Article 19 is only intended to safeguard rights related to freedom of speech. Free press is a component of free speech.[8]

The Constitution's Preamble, which recognizes that each person is protected by the privileges given to them by law, is its beating heart. Additionally, it outlines the Constitution's fundamental principle that the state has a responsibility to defend its inhabitants. The liberty of expression and speech is

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[5] Kingsley International Pictures Corporation vs. Regent of the University of New York, (1959) 360 U.S. 684.
[6] Anand Patwardhan v. Union of India, AIR 1997 BOM 25
[7] Rajgopal R. v. State of TN; A.I.R 1995 SC 264
[8] Rajgopal R. v. State of TN; A.I.R 1995 SC 264.

seen as fundamental. It is a crucial component of freedom in any nation. Since we do not live in a dictatorship, democratic is closely linked to the core of freedom. We are citizens of a nation that takes pride in its freedom, and we are given the power to pick the administration and our leadership. The freedom of expression is regarded as the foundation of a free and open society and should be protected; its infringement is regarded as a breach of all other civil liberties. The unrestricted exchange of ideas in a public arena is the fundamental tenet of a democratic society. The freedom to articulate opinions and thoughts freely, particularly without fear of being punished is crucial to the development of a given community and ultimately of a specific state.[9] Among the most important and fundamental freedoms that is unaffected by state repression or authority. An interpersonal freedom is the freedom to speak and express oneself. An individual is entitled to it as a part of society, and as such, has a responsibility to use it in a way that respects other rights of people to reciprocity.

Therefore, it is subject to fair limitations in the preferences of Independence of India (sovereign power) and honesty, state security, cordial relations with overseas nations, civil security, common courtesy, or moral standards, or in cases involving judicial disobedience, defamatory, or the inciting violence of criminal activity. The independence of the press as well as other institutions is likewise guaranteed.

The protection of one's privacy as well as the capacity to live as a human being has honor, repute, and any other privileges that come with being a citizen of society are fundamental human rights and thus are intertwined with the right to life. The acceptance of the privacy right as a self-governing and unique notion offers a new avenue of recourse for damage arising from unlawful invasion of private in the area of tort law. The rights are stated to have two components: the broad privacy legislation, which permits a tort claim for damages resulting from an illegal violation of privacy, and the fundamental recognition of the privacy rights, which guards against unauthorized state interference. When a person's name is used without his consent for commercial or noncommercial purposes, or when his personal story appears on papers or in printed without his consent, the first part of this rights must be deemed breached.[10]

Even without freedom of speech, opinion, and opinion as a civic right, Indian democracy is practically unimaginable. In Indian institutions, where laws are made and statements are made that affect how the whole society is structured, the opinion of the majority has a defining political relevance. Popular sentiment is said to be the lifeblood of democracies. While numerous social, artistic, intellectual, economic, commercial, governmental, and religious institutions shape and mould popular sentiment. Because of the press, its success and availability have emerged as key elements of the general public's perception.

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[9] For more detail see Section 228A; Indian Penal Code,1860

[10] Gobind v. State of Madhya Pradesh; AIR 1378 SC 1975

Judicial Method to Press Freedom and Privacy Rights:

The Indian Constitution recognizes the right to privacy and the liberty of speech as essential rights. It is protected by the fundamental rights of freedom and life.[11] In the state's best interest's cordial relations with other countries, decency, and civil security, as well as in cases of court disobedience or defamatory of an offender, the state may impose reasonable limits. Statutory justification is the procedure by which the observers of the administration try to comprehend and, as a result, control its activities according to the will of the assembly. The language theory of judicial comprehension will be carefully considered, and its acceptance will be evaluated. Laws serve as a written communication medium between the regulatory public and the legislature. Statutory interpretation is the method by which the legislative public tries to comprehend the rules set out by Parliament in order to control its actions. Only when this procedure has neglected, in which case it is either because Parliament failed to convey its views properly or because those views lack a clear face, does legal interpretation take place.[12]

Privacy's Position as a Basic Right:

The most recent rulings have clarified the status of the privacy rights as a main right under the Establishment rather than creating a new privacy rights as a main right. It demonstrated that it is based on fundamental human rights like Article 19[13] as well as the freedom to life and individual freedom under Article 21 of the Indian Constitution.

By reducing obstacles to privacy, it can be protected from invasions based on things like sexual orientation, ethnicity, and political allegiance.[14] The Supreme Court's ruling is based on the following principles, among others:

(i). The privacy right is seen as inalienable: Any person's overall need for privacy might be considered to be one of their basic human rights. It is there just by virtue of being a person, as well as a recognized psychological freedom that belongs to people because they are unable to reveal sensitive personal information or their sentiments with others. Every individual has an innate urge for privacy, which distinguishes humans from other animals. It cannot be forcibly removed from anyone and isn't something the state grants.

(ii). Connection to self-respect: According to the ruling, privacy is an absolute right that is protected by the Foundation alongside other fundamental freedoms. Every individual has an individual with whom he or she can communicate their feelings, emotions, love, hatefulness, etc., and even those emotions, feelings, and love communicated with another member shall be between them. Privacy is a crucial component of self-respect and it guarantees that an individual can live a life of self-respect among many others. The right to liberty and dignity guaranteed by Article 21 of the Indian Constitution includes

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[11] For more detail see Article 19 and Article 21, Part III of Constitution of India.

[12] Cohen, Elliot D., Journalism Ethics: A Reference Handbook

[13] Article 21, Constitution of India.

[14] Two Concepts of Freedom: Misuse of the concept of positive liberty: available at http://www.open.edu/openlearn/history-the-arts/culture/philosophy/two-concepts-freedom/content-section-3.4;assesed on 15/10/2022 at 6:34 pm IST.

qualities like self-respect, decency, and honesty by nature because life cannot be enjoyed in isolation as well as a human is most likely to live in community. When freedom is protected and people live with self-respect, life can be peaceful.

(iii). Dedication to treaty commitments: The safety of confidentiality is acknowledged as a fundamental and distinct correct, and humanitarian organizations from around the globe have formed a significance to respect human rights in India under international humanitarian law under the "ICCPR," which created a reference to the safeguard of the Human Rights Act, 1993. The ICCPR upholds the privacy right internationally. The privacy right was also expressly recognized in the Declaration of Human Rights.[15]

Privacy Concerns and Views of Judicial System:

The administration argued that the Apex Court cannot adopt a legal premise because it will not survive and create Supreme Court examination since it is ambiguous and ambiguous. This claim was dismissed by the rulings. The judgements identify the rights as the freedom to be left alone in its most basic form. In accordance with Justice Nariman, the right can be divided into three categories: privacy rights, informational confidentiality, and choice-related privacy.

By quoting a variety of Apex Court comprehensive writings, the Apex Court has tracked the evolution of acknowledgment of a variety of privacy-related aspects. Indian and foreign court decisions and Apex Court restrictions on the privacy right are provided. However, the Lead Judgment states clearly that: This Tribunal really hasn't pursued concerns covered by the privacy right. To address the requirements of the times as they are posed by rule of law and democracy of law, the institutions that establish laws must make the necessary modifications as time goes on. The intent of the Establishment cannot now be the same as it was when it was first adopted. Fear has increased as a result of changes in technology that was not previously the case. Therefore, the Establishment's knowledge has to be strong and flexible to enable potential age ranges to adjust to it in a way that is appropriate for its fundamental or essential skin color.

Concluding Observations:

Article 19(1)(a) of the Indian Constitution protects Indian people' access to the press, which is regarded as an essential component of speech and expression freedom. It assumes that everyone, regardless of race, religion, or gender, has the right to increase their impact in areas of importance or else to be free from all external and internal pressure. This liberty serves as a declaration that the reason of the individual is paramount and that each person is capable of determining what is good or bad based only on his or her own caution and knowledge. The privacy rights are a crucial one that individuals can exercise to enjoy their individual liberty as guaranteed by the Indian Constitution. It is regarded as an old lineage in India. The privacy right and the freedom of the press are regarded as being fundamental rights that support folk's personal liberties. Enforcing these

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[15] Privacy and Human Rights; Global Internet Liberty Campaign.

rights is challenging and can result in civil and criminal proceedings against those who violate someone else's privacy. By bringing about the negative effects of society through the media and individuals appreciating their privacy to the degree that it does not damage anyone, these two support one another.

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MEDIATION IN CRIMINAL CASES WITH SPECIAL REFERENCE TO HEINOUS OFFENCES: A CLARION CALL FOR BREAKING INERTIA IN INDIA

Saurabh Rana*

Abstract-Around 1970, mediation as a part of restorative justice movement formally came into the agenda of modern criminal justice system as one of the alternative dispute resolution mechanisms. Following this, many criminal jurisdictions world-over began to experiment with it particularly in minor offences, neighbor disputes and juveniles cases. Then it was applied to other 'suitable' offences such as matrimonial offences, commercial cases etc. In some western jurisdictions like UK, USA, Canada it was done through specific groups'/circles' initiatives along with the requisite state support; and in some jurisdictions like India through judicial activism based on the Constitutional powers of higher judiciary on case to case basis bereft of any legislative backing thereto. Be that as it may, mediation in *heinous* offences- sexual crimes, grievous injuries, culpable homicide etc. has now been applied by western jurisdictions on case to case basis in addition to, though *not* in lieu of, the 'punishment' which has remained the characteristic outcome of all types of criminal justice systems prevailing in the world today. In jurisdictions like India, we are keeping ourselves aloof of any such development as the initiative is coming neither from the judiciary nor by the legislature. We must break this inertia, especially in cases of heinous offences. This situation is particularly worrisome when we look at the research conducted worldwide showing that mediation provides a wholesome and stable solution to the menace of crime including *heinous* offences when applied to the deserving cases in a fitting manner.

Keywords-Mediation, punishment, plea bargaining, compound-ability, crime.

Introduction:

Experience of a crime victim is horrifying but there are no two opinions that the experience of undergoing a criminal trial is also horrible both for the victim and the accused as well. After all, courts are not happy places. No ordinary person in his senses with any prior experience of courts and of the inseparable adjuncts would remain persuaded that its truth is self-evident though he may not question its utility.[1] And what is its projected utility- it has long been the general view that it is the 'punishment' which it metes out to the convicts that really supplies validity and imparts some significance to it.

But then here some questions arise- does punishing somebody for a crime achieve the avowed purpose of our criminal justice administration system, that is, to control the menace of crime in society; does the punishment fulfills

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[1] Morris and Howard, Studies in Criminal Law, Oxford University Press, 1964

the objectives for which it exists out there- the prominent ones being retribution, deterrence, prevention, reformation and for some expiation also. The situation of crime is deteriorating. It seems either we are barking up the wrong tree or we are just not doing enough. If we try to conceptualize this in context of what Braithwaite once observed, 'State under the guise of 'caring', steals citizens conflicts and hands it over to judicial courts'[2]- it seems that the need of the hour is to bring it back to the parties so that they may effectively participate, communicate their priorities in the aftermath of crime and chalk out the way that a better future may be secured both for the victim and the accused and the society in general.

For that purpose, mediation perfectly suits the bill, for it is where the two warring factions may look eye to eye, have a meaningful dialogue with the facilitation of a neutral person called 'mediator' and formulate a restoration plan dissolving the after-effects of crime to a considerable extent.[3]

Mediation in Criminal Cases- The International Scenario

It is not that the world is not realizing the vast array of possibilities of applying mediation in criminal cases. In western criminal jurisdictions, they have been doing it now for a number of years.[4] They also started adopting mediation first in petty criminal cases, family disputes which later acquired criminal dimensions, juvenile cases etc. but then they went further and experimented with the application of mediation in heinous offences even in murder, attempt to murder, sexual assault cases etc. and got encouraging results.

In a growing number of criminal cases in western jurisdictions, victims of heinous crimes find that confronting their offender in a safe and controlled setting, with the assistance of a mediator, returns the stolen sense of safety and control in their lives. Illustrations of these are instances when parents of murdered children have participated in mediation and have expressed their sense of relief after meeting the offender and expressing their grief. A study conducted in the United States of America found that mediated dialogue sessions in severely violent criminal cases were very beneficial to the victims, offenders, their family members and the community at large.[5]

Mediation in Criminal Cases- The Indian Scenario

In India since Vedic times, approximately 4000 years B.C., and then in *Dharma Shastra* era, philosophy of laws was developed by eminent indigenous jurists. They recognized the then existing usage/customs for resolution of

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[2] Strang H and Braithwaite J, Restorative Justice and Civil Society, Cambridge University Press, 2001

[3] Panchu S, Mediation Practice and Law- The Path to Successful Dispute Resolution, Lexis Nexis, 2015

[4] Zehr H, The Little Book of Restorative Justice, Good Books, 2002

[5] Umbreit MS, "Restorative Justice Through Victim- Offender Mediation: A Multi-Site Assessment", 1998, *Western Criminology Review* 1(1)

disputes by indigenous methods which prominently covered mediation also. A famous sanskrit quote "*santosham paramam sukham*" is well reflected when Gautam Buddha says, "Better than a thousand hollow words is one word that gives peace". Mediation is one of the modes for attainment of "Peace".[6]

Now, we shall look at the recent happenings in the realm of mediation in criminal cases in India in a critical way. For that purpose, let us divide our discussion in two parts- first, we shall critically evaluate the role of legislature in this respect and then, we shall look at the way our judiciary, especially the Supreme Court of India is advancing in this context.

I. Mediation in Criminal Cases- The Approach of Indian Legislature

If we look at the recent Mediation Bill, 2021, it projects an image of our legislature that is still stuck with the age-old idea that criminal cases are not suitable for the application of mediation. It is the same notions that are reflected when we see the Criminal Procedure Code, 1973 (hereinafter CrPC, 1973) wherein we do not find even a single section providing application of mediation to criminal cases in any form whatsoever.

Alternative Dispute Resolution methods in any form whatsoever has not been mentioned by any provision of CrPC, 1973 in the manner it is done in Civil Procedure Code, 1908[7]. Section 320 CrPC, 1973 provides a list of 'compoundable' cases wherein the parties may 'officially' settle their differences- and for that mediation is an effective medium. But without any express legislative provision, the criminal trial courts finds it difficult to officially send a case to mediation though they are doing it following the persuasive value of the higher judiciary's observations in this respect- but the fact remains that it is being done only in cases falling in section 320 CrPC, 1973 which account for merely around 10% of the total sections enumerated in Indian Penal Code, 1860 which is the general criminal law prevailing in India.

In the year 2006, the Indian legislature added sections 265 A to 265 L in CrPC, 1973 and thereby introduced the concept of 'Plea Bargaining'; but then the idea of plea bargaining is inherently different from that of mediation- primarily because the plea bargaining revolves around a multi-party setting i.e. the public prosecutor, investigating officer, defence counsel along with the victim and accused whereas mediation is between the accused and victim with only the facilitation of a mediator.

In this context, as said above, the recent Mediation Bill, 2021 also disappoints. It tantamount to saying that mediation is not generally to be applied to criminal cases except in matrimonial cases, cases of predominantly civil or interpersonal nature and the cases falling in section 320 of CrPC, 1973- which is nothing more than simply a compilation of instances enumerated by our Supreme Court wherein, showing judicial activism, it has recognized the

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[6] Mediation Training Manual of India, Mediation and Conciliation Project Committee, Supreme Court of India

[7] See section 89, Order 10 of the Civil Procedure Code, 1908

possibility of mediation in criminal cases without an express legislative backing. Hence it is clear that our legislature is not yet ready to move beyond the territory already chartered by the Supreme Court though hesitantly and in a piece meal manner.

II. Mediation in Criminal Cases- The Approach of Indian Judiciary

Application of mediation in criminal cases is such an area of law that is being led by the Supreme Court though in an ad-hoc case to case basis; and the legislature is just following the suit without any sign of taking further initiatives taking leads from the international developments in this respect.

If we look at some relevant opinions of the Supreme Court in this respect, we can ascertain certain factors and parameters upon which the court has acted and allowed / disallowed the possibility of compromise / mediation in criminal cases. Some of them may be delineated as follows-

(a) Matrimonial Cases

We may look at *B. S. Joshi's* case[8] in this respect. In that case, the FIR was registered under sections 498-A, 323 and 406 IPC at the instance of the wife. When the criminal trial was pending, the dispute between the husband and wife and their family members was settled. It appeared that the wife filed an affidavit that her disputes with the husband and the other members of his family had been finally settled and she and her husband had agreed for mutual divorce. The matter was taken to the High Court by both the parties and they jointly prayed for quashing the criminal proceedings. The High Court dismissed the petition for quashing the FIR as in its view the offences under sections 498-A and 406 IPC were non compoundable and the inherent powers under section 482 of the Code could not be invoked to by-pass section 320 CrPC. The matter then reached the Supreme Court. It observed that 'the High Court in exercise of its inherent powers could quash such criminal proceedings or FIR or complaint; that the *hypertechnical* view would be counterproductive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier in their lives'.

(b) Overtones of Civil Dispute

Looking at *Nikhil Merchant's* case[9], we find that it was a case registered for the offences of cheating and forgery with a bank, out of which the offence of forgery was not compoundable; the Apex Court allowing its quashing on the basis of a compromise arrived at between the accused and the bank, observed that 'certain documents were alleged to have been created by the accused to avail credit facilities of the bank beyond the limit to which he was entitled. The dispute between the accused and the bank has been set at rest on the basis of a

[8] B. S. Joshi v State of Haryana (2003) 4 SCC 675
[9] Nikhil Merchant v CBI (2008) 9 SCC 677

compromise whereunder the dues of the bank have been cleared. The dispute involved herein has overtones of a civil dispute with certain criminal facets. On an overall view of the facts, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings. In our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise'.

(c) Physical Violence Cases

In *Narinder Singh's* case[10] the Supreme Court seemed inclined to consider compromise even in such cases; it observed that 'offences like those under section 307 IPC (attempt to murder) would fall in the category of heinous offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving of that charge. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital / delecate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case, it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case, it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties'.

Then in the year 2022, in *Daxaben's* case[11] (based upon section 306 IPC-abetment to suicide), the Supreme Court observed that, 'Such offence is a grave and non-compoundable offence. Where the victim and offender have compromised disputes essentially civil and personal in nature, it can be recognized and the court can proceed further on the basis of that settlement. But heinous or serious crimes, which are not private in nature and have a serious impact on society cannot be proceeded on the basis of dialogue/settlement/compromise between the offender and the complainant and/or the victim. Crimes like murder, rape, burglary, dacoity and even abetment to commit suicide are neither private nor civil in nature. Such crimes are against the society.' The court cautioned that, 'Recognizing agreement between the accused and victim/survivor, would set a dangerous precedent, where complaints would be lodged for oblique reasons, with a view to extract money from the accused. Also, financially strong offenders would go scot free, even in cases of grave and serious offences such as murder, rape, bride-burning, etc. by buying off informants/complainants and settling with them.'

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[10] Narinder Singh v State of Punjab (2014) 6 SCC 466

[11] Daxaben v State of Gujarat, SLP (Crl.) No.1132-1155 of 2022, Decided on 29 July 2022; 2022 LiveLaw (SC) 642

Finally the court observed that, 'In Criminal Jurisprudence, the position of the complainant is only that of the informant. Once an FIR and/or criminal complaint is lodged and a criminal case is started by the State, it becomes a matter between the State and the accused. The State has a duty to ensure that law and order is maintained in society. It is for the state to prosecute offenders. In case of grave and serious non- compoundable offences which impact society, the informant and/or complainant has the right only of hearing so as to ensure that justice is done by conviction and punishment of the offender.'

It seems obvious after reading the above observation that the hesitation reflected by our Supreme Court towards applying mediation to a broader range of criminal cases has been due to the fact that we still equate mediation with 'compromising' the case. Probably the same stands for our Parliament also. Compromising is definitely an essential feature of any effort around mediation in a civil case *but* it is not so in a criminal case. The real idea of mediation in a criminal case is not about accused apologizing as a *quid pro quo* for reduction in his punishment- and probably our policy makers are not getting it straight.

Concluding Observations:

Crime is not *only* between the accused and state; in fact, it is first and foremost between the accused and victim. Any endeavor in the name of a criminal trial is destined to doom if we sideline the victim and reduce him to the status of just a prosecution witness in the array of witnesses in the criminal trial. Crime which took place between the 'offender and victim' cannot be redressed between the 'offender and state'. It has to involve both the offender and victim- at a time- until that happens and the offender and victim do not come face to face, there cannot be any stable solution of the underlying dispute. Punishing the offender is not *all* that a victim requires and even expects from a criminal justice administration system. On the other hand, punishment *alone* does not bring any change in the psyche of offender rather it affects him adversely and often converts him into a hardened criminal full of vengeance.

In jurisdictions like India, so far as coverage of offences for mediation is concerned, we are keeping ourselves aloof of any development on this front happening internationally.[12] We are behaving as if we are in a state of inaction and inertia; the initiative is coming neither from the judiciary under its Constitutional powers nor by the legislature as is evident from the fact that even Mediation Bill, 2021 does not broaden the category of cases wherein mediation can be applied. The result is that in cases other than those mentioned above- that is, matrimonial cases, cases of predominantly civil or interpersonal nature and the cases falling in section 320 of CrPC, 1973- and there is no prize for guessing that such 'other' cases would all generally be 'heinous' offences- we are not able to utilize mediation in any form and at any stage whatsoever. There has

[12] See e.g. Allais, Lucy, Wiping the Slate Clean- The Heart of Forgiveness, Philosophy and Public Affairs, 2008; Boonin David, The Problem of Punishment, Cambridge University Press, 2008; Garrard, Eve and David McNaughton, Conditional and Unconditional Forgiveness in The Ethics of Forgiveness- A Collection of Essays, edited by Cristel Frick, New York Routledge, 2011

been sufficient backup in the form of research including empirical to assert that the mediation provides a wholesome and stable solution to the menace of crime including heinous offences when applied to suitable cases in a fitting manner. We must *not* act under an impression, as is evident in the observation of the Apex Court in *Daxaben's* case *supra* that mediation essentially means reduced sentence for the offender. Whether mediation should be linked with the possible sentence is a matter on which there is ample scope of future research; but there is no dearth of current researches[13] worldwide showing that, in suitable cases[14], (even) *post*-sentence mediation would bring drastic changes in the way the criminal justice system is perceived by accused, victim and the society in general. Looking at the pendency of criminal cases in India, we must break this inertia before the idea of access to justice to the formal legal system becomes practically redundant for people in general and the downtrodden in specific.

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[13] See e.g. Jane Bolitho, Inside the Restorative Justice Black Box: The Role of Memory Reconsolidation in Transforming the Emotional Impact of Violent Crimes on Victims, International Review of Victimology, 2017, Vol. 23(3); Luke Russell, Forgiving While Punishing, Australasian Journal of Philosophy, 2016

[14] See e.g. Strang H, Repair or Revenge- Victims and Restorative Justice, Clarendon Press, 2002 wherein it has been observed, 'The importance of offender screening and voluntary participation both by offender and victim would be the key factors in finding the suitable cases. Victim must not feel re-victimised; on the other hand, offender must be ready to own his wrongdoing knowing fully well that it may not reduce his sentence.'

LEGAL DISCOURSE OF EDUCATION *VIS-À-VIS* RIGHT TO EDUCATION IN INDIA

Sangita Dutta*

"Knowledge is power. Information is liberating. Education is the premise of progress, in every society, in every family."

-Kofi Annan[1]

***Abstract*:** Education – the medium of continuous development of nation-states-statespersons, instrument of human dignity, vehicles of poverty eradication, machinery of protest against illiteracy and ignorance, tool of global empowerment, source of immense knowledge and intelligence - is continuously evolving and becoming significant before the world. Education not only transforms the individual but also the state and society. Now, "the education" or "the Right to get Free and Compulsory Education" is a basic instinct of human beings and through several regional and national instruments, this "Right to Education" is recognised, ensured and promoted as a "Fundamental Right" of all human beings. Although now-a-days national instruments are promoting it, yet, the right to get and access of education is universally recognised in the year of 1948 by International Instruments – Universal Declaration of Human Rights (UDHR). Later on various International Conventions, National Constitutions, Development plans, Government policies are enshrined with the same concept of People's basic and fundamental Right to Education. So, the very purpose of this paper is to highlight the transformation of Education in a new face of Right to Education through legal discourse. This paper also briefly points out the socio-economic context in which the Right to Education in India get its birth.

***Keywords*:** Education, Right to Education, Fundamental Right, Legal, India.

Introduction:

Education is not an accessory but it is a necessity to endeavor people's life better. Education transfigures the human personality towards perfection through a synthetic process of development of body, enrichment of mind, the vaporization of the emotions and the illumination of the spirit. In accordance with an old Sanskrit adage: *"Education leads to liberation – liberation from ignorance which shrouds the mind; liberation from superstition which blind the vision of truth."* A person cannot sustain without the basic amenities and education is one of that without which a person cannot breathe properly in a society. It not only enriches the individual but it acts as a pillar on which the entire fabric of nation resides. Education brings economic wealth, social prosperity and political stability and build up the nation's voice towards democratic atmosphere, enthusiast the individual to behave socially as well as

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[1] Kofi Annan - Former United Nations (UN) Secretary General who served as the seventh Secretary-General of the United Nations from January 1997 to December 2006.

provide stability in the society. Education is the very vehicle of knowledge, instrument of human dignity, medium of global empowerment and success. In short, education acts as the milestone of nation's socio-economic progress and development.

The idea of education is very high and noble. According to Herbert Spencer[2], the aim of the education is the *"training for completeness of life"* and moulding the character. The word "Education" derived from Latin words Educare, Educere or Educatum – "Educare" means "to bring up" or "to raise", "Educatum" means the act of teaching or training and "Educere" means "to lead forth" or "to come out". So, all this meanings indicates that education is the process of nourishment of the good qualities of man and draw out the best of every individual. In this regard, the view of Swami Vivekananda [3]is much signified, that: *"Education is the manifestation of perfection already present in a man."* The Oxford Living Dictionary (OLD) defines education as: 'the process of receiving or giving systematic instruction, especially at a school or university.' Education is a lifelong systematic and dynamic process of acquiring knowledge through study from infancy to maturity where a person's experience of life reconstructs and remodeled with a changing society by education. In this whole process of education people learn - from another people, learn from diversify society, and learn from life etc. and the medium of providing such education may be in some time a formal or informal one, it not always confined within the boundary of school or college. So, there are three types of education process, Formal, Informal and Non-Formal Education process:

(a) Formal Education- take place in the premises of school, college or institutions i.e. an organized educational model, where with the structured and systemized learning process, intermediate and final assessments are available, certificates are provided, which promotes advanced education.

(b) Informal Education– starts by birth and ends with death. In informal education, no pre-planned conscious efforts are involved, no systemized curriculum are there. It is a natural lifelong process of learning, where people learn from his/her life, from books, internet, television, social media etc. People can also get an informal education from parent, friends, relatives etc.

(c) Non-formal Education– consciously and deliberately imparted and systematically implemented. It is an addition or complementary of formal education. Depending on the national context, non-formal education cover programmes contributing to adult and youth literacy and education for out-of-school children, drop out children as well as training in a workplace, programmed learning, distance learning, computer training etc. where generally practical and vocational education are provided.

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[2] Herbert Spencer – an English philosopher, biologist, anthropologist, sociologist and prominent classical liberal political theorist of the Victorian era.

[3]Swami Vivekananda – a chief disciple of the 19th century Indian mystic Ramakrishna, Hindu monk, spiritual leader, prolific thinker, great orator and passionate patriot of India.

So, Education is one of the most important mechanisms by which a Nation's future found, form and rejuvenate with passing of time.

Receiving Education – A Basic and Fundamental Right of All:

Education in all its forms – formal, informal, non-formal, ensures human dignity, foster physical and cognitive development and direct towards the realization of individual's right and dignity. Education is not a privilege, rather it becomes an instrument to exercise and enjoy all other socio-economic, cultural, civil and political rights. It is such a right of people which is inherent to all equally accessible and available to them without any kind of discrimination of race, colour, sex, place of birth etc. It is an indivisible and interdependent right - very much co-related with other rights. At a moment - a child born, he/she born with the inherent right to life, but what does mean to "Life" – it becomes clear while he/she get the informal education from his/her family or, admitted in school for education. Education or this Right to Education helps children to bring up, nurtured well, basically it provide children – the "Right to Human Dignity", "Right to Go School", "Right to Receive Free and Compulsory Elementary Education", "Right to get Proper Nutrition", etc. When a child receive the taste of education, child can also become very conscious about their "Right to Equality and Equal Opportunity", "Right to Freedom", "Right against all kind of Discrimination", "Right against Exploitation", "Right to get a Pollution-free Environment", "Right to Food", "Right to Shelter", etc. By this "Right to Education", when child attain majority, they can use their "Right to Vote", "Right to form Government", "Right to Free Speech and Expression", "Right to Religion", "Right to follow own Culture" etc. After this stage, when adult looking for a job, then also he/she has a "Right to Work", "Right to Just and Humane Conditions of Work", "Right to get leisure", "Right against Poverty Eradication". By the equal chance of work, person avail the "Right to get Fair Remuneration", "Right to Property", "Right to adequate means of Livelihood", "Right to Improve Public Health", "Right to get Public Assistance against Unemployment, Old Age, Sickness and Disablement". So, "education" acts as the bridge between an individual and his/her rights. It is rightly an enabling right which gives people "Right to Equal Justice", "Right to Free legal Aid", "Right to Speedy Trial" etc. Here, John Dewey [4] rightly said that: *"Education is not preparation for life; education is life itself."* It is through education one can change the face of the world. Now, right to education is recognised and guaranteed as a human right in international and regional human rights treaties as well as national constitutions. The Committee on Economic, Social and Cultural Rights positively declared in the General Comment 13, Para.1 that:
"Education is both a human right in itself and an indispensable means of realizing other human rights." Through education, people can –

(i). Obtain knowledge, skills which promote empowerment and self-consciousness;
(ii). Develop own personality and dignity;
(iii). Know about their rights and claim it against violation of rights;

[4] John Dewey – an American philosopher, psychologist, and educational reformer whose ideas have been influential in education and social reform.

(iv). Know about their duties to other individuals and community;
(v). Promote human rights;
(vi). Maintain equality in society and promote non-discrimination between persons;
(vii). Ensure peace in society through understanding, tolerance, respect and friendship.

They are also identifying 4As in Para. 6 as the essential feature of education mention below:

a) **Availability** – Education must be free, should be available in sufficient quantity of educational institutions with adequate room, safe drinking water, hygienic sanitation system, facilities of library, computer technology and trained teachers within the State jurisdiction.
b) **Accessibility** - Education should be physically accessible to all including the disable person within the State jurisdiction without any subject to discrimination on any of the prohibited grounds. Even in the case of economic accessibility – elementary education should be free and compulsory for all and it is required by the state parties to introduce free secondary and higher education.
c) **Acceptability**–The content of education, specially the curriculum, teaching methods must be relevant, culturally appropriate and of good quality as the students can accept that.
d) **Adaptability** – Education must be flexible within the changing needs of the society as well as the diverse needs of the students as students can adapt the education fully.[5]

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[5] General Comment 13 on the right to education (Art. 13 of the International Covenant on Economic, Social and Cultural Rights): a) Availability – functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;
b) Accessibility – educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
i) Non-discrimination – education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see Paras. 31-37 on non-discrimination);
ii) Physical accessibility – education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighborhood school) or via modern technology (e.g. access to a "distance learning" programme);
iii) Economic accessibility – education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education;
c) Acceptability – the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational

Socio-Economic and Legislative Framework of Right to Education in India:

In India, the evolution of "education" starts with guru- shikshyaparampara and still continuing with Information Communication Technology (ICT) based education. So, clearly it's a journey of several ages. In case of the development of the education in India, the efforts were made through various Charters (especially - Charter Act 1813) in pre-independence era, in post-independence era through important Commissions (Hunter Commissions, Kothari Commissions). Even after independence of India, abolition of illiteracy and availability of education was the primary desire of the framers of Constitution. So, the notion of education has long been with the human kind but notion of education as a fundamental human right is relatively a new concept. In order to promote free and compulsory education amongst the People of India, the 1968, 1986, 1992 and last 2020 – National Education Policy were also remarkable. Now the Socio-Economic and Legislative framework of right to education, discuss below by categorizing it into four heads.

A. Right to Education as a Directive Principles of State policy:

Initially "Right to Education" secured its place under Article 45[6] of the Constitution of India not as a fundamental right but in lack of economic strength - as a directive principles which required the State within the period of ten years from the commencement of the Constitution - to endeavor to provide free and compulsory education for all children until they complete the age of fourteen years. Such a directive of Article 45 was not confined to providing primary education but it provided free and compulsory education up to the age of fourteen years. So, Article 45 was the first provision of Indian Constitution in this regard. Article 45 also construed as supplementary to Article 24 which prohibit employment of child below the age of fourteen years. So, up to the age of fourteen years child will remain free to receive education. And, with this Article 39(e),(f) and Article 41, Article 46 also declare that State must secure the children of getting opportunities and facilities of full development; State shall make effective provision for securing the right to education and shall not make any policy by which child are subjected of any abusement.[7]

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objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));
d) Adaptability – education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.
Available at:
https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralCommentNo13Therighttoeducation(article13)(1999).aspx

[6] Article 45: Provision for free and compulsory education for children: The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

[7] J.N.Pandey, *The Constitutional Law of India.* (Allahabad: Central Law Agency, 49th edn., 2012) at 297.

B. Right to Education under Article 21:

With the very Constitutional provisions, thereafter a trend followed in the legal discourse that Right to Education is directly flows from Right to Life under Article 21 of the Constitution of India and in this regard the first official document was Ramamurti Review Committee Report, 1990[8] [Recommendation: 6] which was focused on Right to Education and its significance in concurrence with Article 21. Later on the Supreme Court also in numerous cases during interpreting the term "Life" under Article 21 has been held to include "Education" as education promotes dignified life. The first case in this relation was – *Bandhu Mukti Morcha v. Union of India*[9], where at the time of interpreting the scope of the "Right to Life", Court held that it includes "educational facilities" also. Later on, the same declaration came in *Mohini Jain v. State of Karnataka*[10]case. In this case, the Court held that Right to Education cannot be denied in all level and in all age up to fourteen years to a citizen by charging high capitation fee as it is a 'Fundamental Right' under Article 21 of the Indian Constitution and as education in India has never been a commodity, so charging high capitation fee for admission is illegal and clear violation of citizen's right to education. Thereafter the earlier decision was partly overruled in *Unni Krishnan v. State of A.P.* [11]'s case where the Court held that the right to education for children of 'six to fourteen years' is a fundamental right instead of children of all ages and after fourteen years of age, the obligation of the State of providing free education would depend on the economic capacity and State's development.[12] So, the present status shows that right to education for children of six to fourteen years is a fundamental right directly flows from the Right to Life under Article 21 of the Constitution of India.

C. Right to Education as a Fundamental Right under Article 21A:

Right to education as a separate legal provision evolved first time by the Report of Tapas Mazumdar Committee, 1999 [13] encompassed the idea of insertion of "Article 21A" in the Constitution of India after Article 21 with a strong impression that from now the Right to Education to be considered as a separate fundamental rights of Indian citizens instead to refer it in connection to Article 21. Accordingly, 86th Constitutional (Amendment) Act, 2002 came into force which added after Article 21, another Article of 21A [14]– The Right to

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[8]Ramamurti Review Committee (1990), Available at: http://uafulucknow.ac.in/wp-content/uploads/2020/03/Ramamurti_Review_Committee.pdf.

[9]AIR 1984 SC 802.

[10]AIR 1992 SC 1858.

[11] AIR 1993 SC 2178, 2231 : (1993) 1 SCC 645.

[12] J.N.Pandey, *The Constitutional Law of India.* (Allahabad: Central Law Agency, 49th edn., 2012) at 298.

[13] Note for Group of Ministers – at 43. Available at: http://14.139.60.153/bitstream/123456789/2510/1/NOTE%20FOR%20GROUP%20MINISTERS%20BILL-1997-MHRD-1999.pdf.

[14] Article: 21A - *"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."*

Education. Under this provision the Constitution guaranteed the basic right to free and compulsory education of all the children of six to fourteen years within the states jurisdiction. This Article 21A also substituted Article 45[15], which now makes an obligation for the State to provide early childhood care for all children up to the age of six years. Clause (k) also inserted in Article 51A which implies that it is the duty of the parent or guardian of all children to provide basic education from the age of six to fourteen years. Right to Education is concomitant to all other fundamental rights enshrined in Part III of Indian Constitution. In the year of 2001-2002 *"Sarva Shiksha Abhiyan"* [16]also launched to ensure free elementary education in Indian context. However, to make the right in reality, no central legislation was passed even if the Court noting in *P.A.Inamdar's case* that a legislation relating to right to education should be there by the Central Government or in absence of central legislation by the State Government. In 2008, Dalveer Bhandari J. in *Ashoka Kumar Thakur v. Union of India*[17] directed the Union of India to fix a six months' time limit within which if the Article was not going to be finally implemented then Court will do that.

D. Enactment of The Right of Children to Free and Compulsory Education Act, 2009 and its Latest Amendment:

In order to give effect the 86th Constitutional (Amendment) Act, 2002 – finally the Right of Children to Free and Compulsory Education Act or the RTE Act passed in the year of 2009. This Act contains seven Chapters and thirty nine Sections. This Act of 2009 provides that all the children of the age of six to fourteen years have the right to free and compulsory admission, attendance and completion of elementary education. Although this Act comes into force by Central legislation, still this Act gives the responsibility to the Central Government, State Government, local authority, teachers and parents to ensure that all children freely receive elementary education. This Act specifically provides that if any capitation fee or screening procedure charged or followed, then it is a punishable offence. And, most important, the Government of India in the implementation of this Act announced that 25% of seats in private schools for children from poor families be reserved without charging any capitation fee (*T.N.Nursery v. State of T.N.*). This Act also specifically mention that the curriculum should be such as – the learning through activities, exploration and discovery can be possible. It directs that teaching-learning process should be stress free and curriculum should be student friendly. It prohibits corporal punishment, detention and expulsion. And, in the matters of responsibility the Education Department of the Central and State Government would provide – schools with proper infrastructure, trained teachers, study materials, curriculum and also the midday meal facilities within the school compound.

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[15] Substituted Article 45: Provision for early childhood care and education to children below the age of six years - The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. [Subs.by the Constitution (Eighty-sixth Amendment) Act, 2002,s. 3 for art.45(w.e.f. 1-4-2010).

[16] Sarva Shiksha Abhiyan. Available at: https://www.aicte-india.org/reports/overview/Sarva-Shiksha-Abhiyan.

[17](2008) 6 SCC 1: (2008) 5 JT 1.

So, imparting education is the paramount consideration of the State as per the Right of Children to Free and Compulsory Education Act and Article 21A and that is ruled by Bombay High Court in *Shikshan Prasarak Mandal, Pune v. State of Maharashtra*[18]case. In *Mrs. Kitty Sanil v. State of Kerala*[19], the Kerala High Court when explaining the scope of Article 21A, held that provision of the Right to Education Act, 2009, mandated that once a student had been admitted to a recognised school then the student must progress through various stages of elementary education in that school without any hindrance and without being held back in any class or expelled from the school till completion of his elementary education. Again in *Bhartiya Seva Samaj Trust Tr. Pres. v. Yogeshbhai Ambalal Patel*[20] Court observed: "Without education, a citizen may never come to know of his other rights …Democracy depends for its very life on a high standard of general, vocational and professional education." With this explaining that the policy framework behind education in India "is anchored in the belief that the values of quality, social justice and democracy and the creation of a just and human society can be achieved only through provision of inclusive elementary education to all".

This Act also subjected to some amendments. In 2012, on the basis of a Supreme Court judgement in *Un-aided Private School Rajasthan v. Union of India*[21]– the Court upheld the validity of the Act and declares that it would implement across the country except the private "unaided minority educational institutions". The 2017 Amendment of this Act extended the deadline for teachers to obtain minimum qualifications by 2019 to teach the students. And the latest Amendment came in 2019, which abolish "No Detention Policy". This (Amendment) Act, 2019 substitute a new Section for Section 16 with the concept of regular examinations from fifth class to eight class and promote a concept of holding back in certain cases.[22]

In this way, Indian revolutions of right to education are goes on and still a mile to go for achieving the purpose of not only one's future, but also the social vision.

International Framework of "Right to Education":

Achieving the basic right to education only by national frameworks is not enough as millions of child, youth, and adult are depriving in daily basis from this basic right in all over the world. Promoting education in today's world becomes a global challenge. So, several international instruments are adopted in various time to take over the burning issue of providing elementary education to all and suggest some remedial procedure to reduce the illiteracy rate in worldwide. The journey of ensuring the "Right to Education" in international arena starts with Geneva Declaration of the Rights of the Child (1924). Although

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[18]AIR 2010 Bom. 39.
[19]AIR 2015 NOC 997 (KER.).
[20]AIR 2012 SC 3285.
[21]AIR 2012 SC 3445.
[22] Narendra Kumar, *Constitutional Law of India*. (Allahabad: Allahabad Law Agency, 10th edn., 2018) at 440 – 443.

there was no specific reference of right to education in this Declaration, still it lay down the foundation of such right by Principle V, which proclaim that a special treatment, care, and education is needed to every child as because of his physical and mental immaturity. Later on several Declarations, Conventions, Treaties are signed and adopted throughout the world. Some of the remarkable contribution are followed on:

United Nations (UNs) Instruments:

1. The Universal Declaration of human rights, 1948. (Article 26)
2. The Conventions Relating to the Status of Refugees or the Refugee Convention, 1951 (Article 22)
3. The Declaration on the Rights of the Child (Principle 7)
4. The International Convention on the Elimination of All Forms of Racial Discrimination (Article 5 and 7)
5. The International Covenant on Economic, Social and Cultural Rights, 1966 (Article 13 and 14)
6. The International Covenant on Civil and Political Rights, 1966 (Article 18)
7. The Convention on the Elimination of all Forms of Discrimination Against Women, 1979 (Article 10)
8. The International Convention on the Rights of the child, 1989 (Article 28)
9. The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (Article 12(4), 30, 43 and 45)
10. The Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities, 1992 (Article 4)
11. The Convention on the Rights of Persons with Disabilities, 2006 (Article 24)
12. The Declaration on the Rights of Indigenous Peoples, 2007 (Article 14, 15, 17(2), and 21(1))
13. The United Nations Declaration on Human Rights Education and Training (HRET), 2011.

United Nations Educational, Scientific and Cultural Organization (UNESCOs) Framework:

The United Nations Educational, Scientific and Cultural Organization or UNESCO in collaboration with the United Nations has taken –"The Education for All" movement in the World Conference on Education for All[23] (Jomtien, Thailand, 1990) to provide quality basic education for all children, youth and adults. Ten years later, at the World Education Forum (Dakar, 2000)[24], 164 governments pledged to achieve Education For All (EFA) and identified six goals of ensuring free and compulsory education with wide-ranging targets to be met by 2015.The right to education is one of the key principles underpinning the Education 2030 Agenda and Sustainable Development Goal 4 (SDG4) adopted

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[23] See World Declaration on Education for All: https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/9.WorldDeclarationonEducationforAll(1990).aspx.

[24] See World Education Forum, The Dakar Framework: https://sustainabledevelopment.un.org/content/documents/1681Dakar%20Framework%20for%20Action.pdf.

by the international community. Recently in 2021 The UNESCO World Conference on Education for Sustainable Development[25] was held and approved the need to empowerment of learners of all ages to act for sustainability.

The International Labour Organization (ILOs) Framework:

The International Labour Organization (ILO) is the UN special agency dealing with specially the labour issues. But the ILO has adopted an impressive array of conventions including some related to vocational training, teachers, child labour, and Indigenous Peoples' right to education. These are –

a. ILO Convention No. 138 on the minimum age for employment, 1973;
b. ILO Convention No. 182 on Worst Forms of Child Labour, 1999;
c. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

Concluding Observations:

By seeing the significance of Education, it can be said that "Education is the single most vital element in combating poverty, empowering women and promoting human rights and democracy."[26] Education is the need of the hour. It is the means of enjoying the other human rights. It should spread in each corner of the world to remove ignorance and illiteracy. Various National and International legislations are enacted, Conventions and Declaration are passed, education policy is implemented, workshops are organised, different NGOs are working to remove illiteracy in several times but still millions of child is deprived from their basic right to education. Education is not the liability of alone the State; it is a matter of global concern. So, some suggestions are there to make education available for all:

a) A child's life starts with informal education, which he/she gets from his/her home, so, a parent or a guardian's cautious initiative and care can fill the illiteracy rate;
b) A more care from the educational institutions or schools in providing the value education can make a child able to complete the elementary education fully.
c) Student gets the spontaneous inspiration from the teachers, so if the teachers can inspire a student by his/her friendly attitude, then the school dropout problem may reduce.
d) As a responsible citizen when any person get the taste of education, if that person enhance the chance of education for all, means creating a space for every child to attend classes by going school instead of any forms of child labour, then literacy rate can be increased globally.

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[25]See UNESCO 2021 World Conference on Education for Sustainable Development: https://en.unesco.org/events/ESDfor2030.

[26]See General Comment No. 13 of The International Covenant on Economic, Social and Cultural Rights: https://www.ohchr.org/EN/Issues/Education/SREducation/Pages/EducationAndHR.aspx.

e) And, most important, we are in digital age. A child whether goes to school or not, they are accustomed with the mobile phone, television, etc. so, by this devices a more publicity of 'need of education' can be spread.

With this above suggestions, hopefully, one day surely come when 'cent percent literacy rate' becomes a true and development of world promotes.

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ANALYSIS OF "SECURING THE BENEFICIAL ENJOYMENT OF ANOTHER PIECE OF SUCH PROPERTY" IN PARAGRAPH TWO OF SECTION 11 OF TRANSFER OF PROPERTY ACT, 1882

Baleshwar Prasad[1]

Vineet Mishra[2]

Abstract-It is a general perception that Transfer of property (sale) creates absolute interest in favor of transferee. This principal is embodied in section 11 of Transfer of Property act. However its second part provides a kind of exception to it. It provides that if such restriction is imposed by the transferor for the beneficial enjoyment of his another portion of his land then this condition will be valid. This research paper deals with Second part of Section 11 and describes how this part is applied on transfer of property, what are the essential requirements and its relation with Section 40.
Keywords-Property, Transfer, Interest, Lease, Enjoyment, Beneficial.

Introduction:

Section 11 of Transfer of Property act provides that any condition repugnant to the absolute interest is void. It means that if a person has transferred absolute interest to another person then any condition imposed by the transferor on the enjoyment of the property will be void. Section 11 states that

> *"Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction".*

However, second part of this section provides that if such restriction is imposed by the transferor for the beneficial enjoyment of his another portion of his land then this condition will be valid. Second part of section 11 states that-

> "*Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of breach of".*

For example- A has 2 parts of land adjoining each other. He sells one portion to B. A imposed a condition on B that he will not build any structure which will be more than 2 stories so that there is no obstruction of light and air on the A's

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plot. This condition imposed by A on B is valid as this condition is necessary for the beneficial enjoyment of land by A. This condition of A will be protected by para2 of section 11 of Transfer of Property Act.

The expression "securing the beneficial enjoyment of another piece of such property" imposes a condition only on which section 11 second para would apply. This condition is that the transferor should be the owner of the both portion of the property i.e. the property he wants to sell as well as the property for whose beneficial enjoyment he is imposing the condition.

This section will be only applied only when the conditions are imposed on the transferee when it enables the transferor and his family members to seek the enjoyment of his own property, and not of somebody else He cannot direct the transferee to do something which will benefit a third party.

For imposing section 11 second part, the condition imposed by the transferor on the transferee must benefit the land of transferee. Also the condition imposed by the transferor must be reasonable and rational. It must not be arbitrary. For Example- If A sells a part of his land to B with a condition that B will not make double storied building on this land so that A get fresh air and sunlight. However if B would make double storied building then it will not obstruct the way of light and air. Then the condition imposed by A on B will not be valid. Also a condition to not to make a double storied building sounds unreasonable.

Conditions Required for Imposing Section 11 Paragraph 2:

For imposing section 11 paragraph 2, three conditions must be fulfilled-
1- Firstly the transferor must be the owner of two immovable properties. Out of these two he must sell one to the transferee and retain one with himself. These two property must be in proximity with each other (they must be adjoining each other). Also, the transferor must own some immovable property which is in proximity with the transferee's land for whose beneficial enjoyment, transferor is imposing the condition. There must be absolute transfer of property.
2- There must be some benefit which the transferor wants to get from the transferee's land. Without any benefit, condition cannot be imposed. This benefit must be in connection with the transferor's land. Mere benefit arising out of transferee's land would not suffice and restrictions imposed on it will attract section 11 first paragraph. For better understanding we can refer to the given below case.

In *Lilawati v. Firm Ram Dhari Suraj Bhan*[3], the plaintiff Lilawati sold about 100 plots in village Pillu Khera in Jind Tehsil, the object being to start a Mandi there. The defendant-respondents M/s. Ram Dhari Suraj Bhan purchased plot No. 70 for Rs. 99/- in pursuance of the sale-deed Exhibit P. 1 of 20th of April, 1958. Although the sale was absolute, some conditions were introduced, on of these being that a sum of two annas in every hundred rupees would be paid as haqe malkana to the vendor. Out of this sum of two annas, one

[3] AIR1971P&H87

anna was to be given to the village Panchayat and the remainder one anna was to be retained by the vendor Lilawati. It is not necessary to go into the other conditions which required the vendee to construct a shop on the plot sold to him and to keep a frontage for purposes of the shop. The defendants having refused to comply with the direction for payment of haqe malkana, the plaintiff brought a suit for rendition of accounts to enforce the condition. The question before Court was: Whether after a vendor has made an absolute sale of property he can enforce the payment of the sum of rent from the vendee? The Court rejected the appeal of the plaintiff saying that this is an absolute transfer and Section 11 will protect the vendee's right.

This case is not related with second paragraph of section 11, but with first paragraph. Here author is trying to show that for imposing section 11 there must be a property which the transferor hold and it should be in proximity with the transferee's land.In this case the benefit which the plaintiff wanted was benefit arising out of vendee's land but it is not connected with the vendor's land i.e. there was no land for whom the beneficial enjoyment has been secured.

3- The condition imposed must be valid and reasonable one. The condition must not be arbitrary. That is to say that one should not put restriction according to their own whims and fancies.

Whether this section can be applied in case of Lease?

This section cannot be applied in case of lease, as there is no transfer of absolute interest. For the application of Section 11 transfer of absolute interest should be there i.e. transfer of paramount ownership. In case of lease, grantor can impose condition and it will be valid. Section 11 is provided in this act so as to safeguard the interest of the seller (so that he can enjoy his portion of immovable property), whereas in case of lease the grantor can impose condition according to his own wish so no requirement of this section is there.

For application of section 11 paragraph 2 absolute transfer must be there. In *Indu Kakkar v. Haryana Industrial Development Corporation*[4], there was an agreement between an industrial corporation and industrial units with a condition that the industrial units shall be established within the specified time failing which their interests shall cease. The industrial units failed to act with the compliance and the corporation ceased the interest. So, this case was filed. On 28.7.1997 a plot of land admeasuring approximately 450 Sq. meters has been allotted to M/s York Printers (which will hereinafter be referred to as the allottee) as per a letter of allotment issued by Haryana State Industrial Development Corporation United Corporation" for short). The said plot is situated within the industrial complex at Dundahera in Gurgaon District (Haryana). The price for such allotment was tentatively fixed as Rs.l3,455/- and the allottee was put in possession thereof. On completion of remittance of the entire amount payable by the allottee a registered Deed of Conveyance was executed on 10.12.1982 by the Corporation in favor of the allottee. In fact the

[4] AIR 1999 SC 296

said plot was transferred by Haryana Urban Development Authority (MUDA its acronym) in favor of the Corporation for facilitating the objects and purposes of Haryana Urban Development (Disposal of Land and Buildings) Regulation 1978. There was no absolute transfer as observed from the deed of conveyance. As the allottee failed to establish the industrial unit till the end of 1983 a notice was issued by the Corporation on 6,1,1984 calling upon the allottee to show cause why the plot should not be resumed. In the reply which allottee sent to the Corporation certain reasons were highlighted for showing why It could not complete construction of the building for the proposed industrial unit. But the Corporation was not satisfied with the reply and hence on 16.3.1984 the Corporation resumed the plot. The allottee has contended before the court that clause which provided for establishment of industries is void as it is in contravention with section 11 of TPA. But that contention was not accepted because the Deed of Conveyance had not created any absolute interest in favour of the allottee in respect of the plot conveyed. The Supreme Court held the condition to be valid causing no restrain on the mode of enjoyment of property, and therefore, the agreement was held to be valid and binding on the parties.

The researcher has included this case to establish the fact that for imposing section 11 transfer of absolute interest must be there. In this case allotment was there but not transfer of absolute interest. So, this section cannot be imposed in case of type 1 lease where exclusive possession is granted because that is not transfer of absolute interest.

Who can file a case for the beneficial enjoyment of property?

When a transferor transfers a property to a transferee with certain conditions imposed, then on breach of such conditions only transferor can sue the transferee and nobody else. If the interest of a third party suffers due to the noncompliance of the conditions then also he cannot sue the transferee. For better understanding we can refer to a case of Allahabad High Court in which the position regarding to Second portion of Section 11 and who can enforce it is explained clearly. In *Bhagwat Prasad v. Damodar Das*[5], Vidya Ram who was respondent number 4 in this case was having a plot, which he divided into 5 portions He divided his plot into five portions, and sold one plot to respondent No. 1, two portions were sold to the plaintiff-appellant and the fourth portion was sold to respondent No. 3, while the last portion was retained by respondent No. 4 for himself. To the north of these portions, a strip of land 10 feet in width was provided for the benefit of all the purchasers and according to the plaint case, it was agreed upon that no constructions would be made on this strip of land by any purchaser. Respondents 1 and 2 made certain constructions on the said strip of land including a latrine. The plaintiff, therefore, sued for demolition of these constructions. The suit was contested by respondents 1 and 2 on various grounds. The main ground with which I am concerned in the present appeal is that the contract for leaving the strip of land unbuilt was arrived at between each purchaser on one side and the original owner on the other side .and, therefore, the plaintiff had no right to sue. The other pleas raised by the

[5] AIR 1976 All 441

respondents were that the suit was barred by estoppel and acquiescence, and that the respondents had not committed any breach of the contract by making the constructions. Both the courts below have held that although respondents 1 and 2 had made constructions in contravention of the terms of the sale deed, yet the plaintiff had no cause of action and had no right to bring a suit. The other pleas raised by respondents 1 and 2 were, however, repelled. In view of the above mentioned findings, both the Courts below dismissed the suit of the plaintiff and appellant applied in this court.

The court said in this case that the appellant has no cause of action to sue the respondents. Only the transferor can sue the respondents. In the words of court- "Undoubtedly therefore the transferor, namely, respondent. No. 4 had a right to enforce the direction contained in the sale deed. The transferor is no doubt a party to the suit and is also supporting the claim of the appellant, but it is evident that he has not come as a plaintiff and is not seeking to enforce the above mentioned direction. It, therefore, now remains to be seen whether the plaintiff, who is only another transferee, can enforce a direction which is contained in the sale deed of another transferee. The general rule of law is that a contract will bind only the parties thereof and a third person cannot enforce any condition or term embodied in the contract. This rule also has certain recognized exceptions but it is clear that the instant case does not fall within those recognized exceptions. Thus ordinarily speaking, because the plaintiff was not a party to the contract, which was arrived at between the transferor (respondent No. 4) and the transferees (respondents 1 and 2) the plaintiff cannot be held entitled to bring a suit for enforcement of any term contained in that contract."

Thus we can see that although the structure made on the land strip was violating the right of the transferor then also the third party was not given a right to sue. It also supports the contention given by the researcher earlier that for applying this portion of section 11 one has to previously own both the part of the immovable property. The appellant in this case cannot sue the respondents.

Against whom this section can be enforced?

`This condition imposed by the transferor is not only against the first transferee but also against the subsequent transferees. As the benefits of a covenant attach to themselves to the land and run with it, irrespective of the owner, they can be enforced not only against the transferee who was party to the contract, but also against all subsequent transferees, for value if they had noticed of it, and irrespective of notice against gratuitous transferees.

In *Rogers v. Hosegood*[6], A, the owner of a house sells the adjoining land to B with a condition that B would leave open some area for the benefit of the seller. After A died, the assigns of B wanted to construct some structure on it. Heirs of A not allowed this. The assigns of B contended that this covenant will not run to them.

[6] (1900) 2 Ch 288

Decision- Court said that these condition will also have to be followed by the assignees of B. So the heirs of A can restrict them.

Other cases relating to the restrictions imposed for the beneficial enjoyment of another piece of such land"

In *Tulk v. Moxhay*[7], A was the owner of a vacant piece of ground, and several houses forming a square. The garden had an equestrian statue standing in its centre and around it, stone work and iron railings. A sold this garden to B with a condition that B, his heirs/assignees would at all times at their own costs and charges, keep and maintain the garden and the statute in its own form, as a square garden in an open state without any building, in neat and ornamental order carry out sufficient and proper repairs. The contract further provided that B would allow the other inhabitants of the square, access to the garden on payment of a reasonable rent. A at the same time, retained several houses in the square. B sold the garden to C, and it passed several hands till X bought it. It is noteworthy that the conveyance deed through which X got the garden contained no conditions, positive or negative. However, X was aware, that while initially selling the garden to B, A has imposed these conditions. He however, manifested an intention to alter the character of the garden and built upon it. He contended that these conditions were burden on land , and were enforceable only as between the parties to the contract and not against the subsequent purchasers for value. An injunction was granted to A, restraining X from converting, using or building upon this garden or changing its character. On appeal by X, court held that X who was aware of the conditions in the contract, irrespective of their character, was bound by it. The Court said the transferor may impose conditions restraining the enjoyment of land if such restrictions are for the benefit of the adjoining land of the transferor. Court held that no one purchasing with the notice of an enquiry can stand in a different situation from that of party from whom he purchased; and therefore X, who was aware of the conditions in the contract, irrespective of their character, was bound by it.

In *R.D.K. Chinna Venkatappa Nayanim Bahadur Varu V Gubba Sundararajulu Naidu*[8] an appeal have been filed against the order of the Judge of Chittoor allowing the sale of certain villages in execution of a decree in O.S. No. 17 of 1910 at the instance of the respondent. The sale of the villages was objected to by the appellant who was the decree-holder in the case and who transferred a portion of the decree to the respondent's assignor. The decree itself was a decree for maintenance obtained by the appellant as one of the junior members of the Kalahasthi family against the estate of Kalahasthi. The decree provided for payment of Rs. 400 a month charging the whole estate of Kalahasthi for payment of the said amount. The maintenance was never paid regularly and it was always in arrears. On 11th September 1922 there was a large amount of arrears due and payable to the appellant. He transferred a portion of the said arrears by Ex. I in favour of one Radhakrishna Chetty who assigned his interest therein to the respondent. The question now turns upon

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[7] (1848) 8 RR 289 (292)
[8] CIVIL REVISION PETITION NUMBER 1235 OF 1936, MADRAS HIGHCOURT

the construction of the deed of transfer, Ex. I. The decree being a maintenance decree with a specific charge on certain property, the decree-holder was entitled not only to bring the properties to sale in realization of the amount due to him but also to get a receiver appointed over specific portions of the charged property and also to proceed against the judgment debtors personally if the decree allowed it. On the date of this transfer the appellant was entitled to these remedial rights. As he was transferring a portion of the decree he wanted to safeguard his rights in regard to the realization of the rest of the arrears which were still due to him and which he wanted to realize in execution of the decree. Therefore while transferring a portion of the arrears he clearly stipulated that the assignee, the said Radhakrishna Chetty, should not have the right to bring the villages to sale. It was certainly competent to the decree-holder to impose the said restriction. The Court said that the restriction imposed on the enjoyment of property is valid and it is covered by the second paragraph of section 11 and is valid.

Concluding Observations:

Meaning of "securing the beneficial enjoyment of another piece of such property" in Section 11 of Transfer of Property Act, 1882 paragraph two is that when a person transfers a property to somebody else and this transfer is absolute and if due to this transfer of absolute interest there is some problem in enjoyment of that portion of land which the transferor posses right now then he may impose certain conditions which will safeguard his property interest. For imposing this section one has to be the owner of both the property and the property must be adjoining. Although the transfer of interest is absolute and one can do what he wants to do on his property then also in this case if the transferor has imposed certain conditions on the transferee for enjoyment of his land properly then these conditions will bound the transferee. He cannot refuse to accept the conditions by saying that the transfer of interest is absolute and he has got the paramount ownership. In this case we can say the transfer of interest is absolute but having some conditions attached to it.

For imposing this condition the transferee's land must benefit the land of the transferor in some way or other. The covenant imposed must be connected with the use of land by the transferee. The condition imposed must be a reasonable one and must be of type which would benefit the enjoyment of the transferors land.

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CHALLENGES BEFORE INDIAN PRISON SYSTEM

Deepu Kumar*

Ritik Gupta**

Abstract*-Crime, criminal, and punishment are the three important pillars of the Criminal Justice Administration. In the absence of any of the three, the criminal justice system might not work efficiently and effectively. There, the prisons come into the picture to keep the evil minded, who have committed acts that are accepted as crimes in the society, away from the society. But the notion behind imprisonment has undergone significant change – from punitive to reformative approach. Nevertheless, the system faces quite a lot challenges to deal with in the present time. This chapter analyses the prison reform movement in India with a view to understand the challenges faced by it.*

Keywords: Prison, Punishment, Offender, Criminal Justice Administration, Rehabilitation.

Introduction:

"And the wild regret, and the bloody sweats,
None knew so well as I:
For he who lives more lives than one
More deaths than one must die

I know not whether Laws be right,
Or whether Laws be wrong;
All that we know who lie in gaol
Is that the wall is strong;
And that each day is like a year.
A year whose days are long.

And yet, and yet,
These Christs that die upon the barricades,
God knows it I am with them, in some ways."

The above poem is written by Oscar Wilde and this pretty much sums the story of prisoners who have spent time for any offence in prisons almost in any corner of the world including India. The story of prison is almost sordid or squalor. Prison administration is an essential component of the criminal justice system in different nations, the institution of jail is referred to as "Correctional Facilities," "Detention Centers," "Remand Centers," "Jails," etc. Prison has served various purposes and the role of this institution have changed with time from punitive, and deterrent to reformative and rehabilitative or a mix of both at some places or partly or completely one or the other at a different place, still existing.

The history of prisons, globally, depicts the changes with respect to the reaction of society to crime or criminal acts from time to time. Prison can be used

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as a tool to punish or exact revenge by making the offender's life miserable and challenging, but the system of incarceration also serves a number of other purposes. The prison lifestyle and subsequent inability of inmates to commit any crime again or again satisfy the preventive goal of punishment.[1]

The purpose of creation was initially to punish prisoners guilty of crimes but with time things have changed and therefore to understand it better we could see the illustration – If prisons are created for retribution or to avenge the crime committed by the offender then the condition inside the prison would be hostile or punitive to strictly restrict the offenders and inflict more pain and suffering. This is, in a sense, illustrative of the principles of hedonism given by Bentham. *Per contra*, there would be fewer restrictions and controls over the criminal inside the institution if prison were employed as an institution to treat him as a deviant. The contemporary perspective promotes treating offenders and views crime as a societal illness. In a similar vein, the Supreme Court of India observed:

> Progressive criminologists across the world will agree that the Gandhian diagnosis of offenders as patients and his conception of prison as hospitals – mental or moral – is the key to the pathology of delinquency and the therapeutic role of punishment. The whole man is a healthy man and every man is born good. Criminality is a curable deviance. Our prisons should be correctional houses, not cruel iron arching the soul.[2]

Prison System:

The history of the jail system is closely aligned with the development of the imprisonment system in the early 19th century. The jails were initially used as detention centers for undertrial prisoners. People who committed political crimes, war crimes, or who didn't pay their dues or fines were imprisoned in an effort to compel confessions or collect debt or fines.

The words 'crime', 'criminal', 'punishment', and 'imprisonment' are closely connected in a fashion that one doesn't go without the other. In every society, emphasis is placed on crime and the subsequent punishment meted out to the criminal for the act of crime, since it is seen by society as a crime against the public or society at large. The object of punishment, Manu explained that "there can be no society without crime and criminals"; hence for every nation on earth, the system of prison is inevitable or indispensable. Personalization displays a system of punishment and a way of institutionalizing suspects, defendants, and prisoners while they are being tried.[3]

The concept of imprisonment or putting someone in gaol has been accepted widely the world over as a form of punishment in the Criminal Justice Administration. The concept of imprisonment as punishment first developed in the United States of America where it was primarily intended to detain those awaiting trial or sentencing or those who are unable to pay their debts. The

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[1] N.V. Paranjape, *Criminolog, Penology Victimology* 495 (Central Law Publications, Allahabad, 17th edn., 2017).

[2] *Mohammad Giassudin* v. *State of Andhra Pradesh*, AIR 1977 SC 1926.

[3] Ranganathaiah C.B., *Critical study of prison reforms in India: An overview of the prevailing system of prisons in Karnataka* (2014) (Ph.D. thesis, Bangalore University) *available at*: http://hdl.handle.net/10603/149011 (last visited on Oct 11, 2022).

objective of imprisonment is to prevent crime by incapacitation[4] and deterrence (i.e. a behavioural response). Notwithstanding, almost globally the earlier response to crime was cruelty as it was viewed as sinful act and the criminals as inners and the punishment meted to them ranged from corporal, humiliating, public whipping, branding, mutilations to hangings in public view so as to remind to public of the result of violating the law.[5]

The two models, in the 1820s, came to the fore in the USA viz. the Pennsylvania system and the Auburn system. In the later system, the inmates were placed in solitary during evenings though used to work together in the day time but with the caveat of maintaining complete silence. *Captain Elam Lynds* is credited with the creation of this system and he emphasized on treating inmates equally and maintains extremely strict prison discipline which included from wearing of uniforms, work and prayers during the day, no visitors, neither send nor receive any mail etc. It was the belief that the strict discipline would transform violators into law abiding citizens. In the former system, the emphasis was placed on total silence and complete separation of each prisoner. The prisoners were confined to their respective cells during the term of entire period of incarceration where they ate, worked and slept in their cells alone.[6]

Prison System: Pre – Independence India

The Oxford Dictionary defines prison as "a place properly arranged and equipped for the reception of persons who by legal process are committed to it for safe custody while awaiting trial for punishment". Like every prison in the world, India too had offenders detained until trial and judgment and its execution initially. The foundation of ancient Indian society was the set of principles articulated by Manu and defined by Yajnavalkya, Kautilya, et al. The Arthshastra lists various offences and the corresponding punishments. The punishment for offences against people, property, the institution of marriage, and the administration of justice was considered heinous and typically included mutilation, death, and penance.[7]

During medieval India, the legal system more or less resembled to that of ancient India and the contemporary rulers seldom made any advances to tamper with day-to-day justice administration. Crimes were classified into three groups:

(a) offences against God,
(b) offences against the state, and
(c) offences against the private classes.

The punishments were of four classes for the above-mentioned offences such as-hadd, Tazir, Qisas, tashhir.

These punishments included fines and confiscation, forfeiture of rank and title, subjecting to humiliation, banishment, whipping, mutilation of offending

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[4] It refers to prevention of crime resulting from physical isolation of offenders.
[5] *Supra* note 3.
[6] *Supra* note 3 at 170,171.
[7] Vidya Bhushna, *PRISON REFORM MOVEMENT IN INDIA* 407 *available at*: https://ijsw.tiss.edu/greenstone/collect/ijsw/archives/HASH01f1/5cd1f31a.dir/doc.pdf (last visited on Oct 11, 2022).

limbs, executions, and other corporal punishment.[8] Allaudin Khalji's market reforms were very popular and so were his punishments which he used to give to those committing fraud or deception on the consumers. The King in order to check used to send children to the market and if the owner played in deception in terms of weights or measures, the king used to punish the guilty owner by mutilitating muscle from the body equal to the weight of the deception played by him. The Mughals, subsequently, were equally cruel and draconian in terms of giving out punishments to the offenders at that time. The detainees were mistreated, humiliated, and subjected to the cruelest treatment throughout that time. Furthermore, they were imprisoned in the fortresses built for this purpose under the strict supervision of the administration, and it (the jail) was regarded as a place of fear and torture.[9]

We all know that the Britishers first came to our country with the intention to carry out trade however with the passage of time they fortified themselves and thrived on the weak rulers at the centre of the power at that point of time. Consequently, they established their structure of administration to rule India as their "colony". Nevertheless, during its initial phase they neither altered the existing legal structure nor tried. But, subsequently, to get hold of the power and to wield power they began the process, starting with the introduction of Regulating Act of 1773 vide which the Supreme Court at Calcutta was established to exert – all civil, criminal, admiralty and ecclesiastical jurisdiction.[10]

In the year 1835, the first attempt of prison reforms was initiated wherein 43 civil, 75 criminals, and 68 mixed jails were set up. The District Magistrate was the person in authority to run these institution, however, they were known for their indifferent attitude towards maintaining these institution, ergo, conditions therein was extremely poor – inadequate food, improper medical attention etc. The first committee on prisoners in India, of which Lord Macaulay was a member, was established on January 2, 1836, as a result of his recommendation that the then-Indian Government should pay attention to the barbaric situations in Indian Jails. The committee in its report severely criticized:

> the corruption of the subordinate establishment, the laxity of discipline and the system of employing the prisoners in extra-mural labour on public roads.12 The committee in its recommendations deliberately rejected all reforming influences such as moral and religious teaching, education or any system of rewards for good conduct and suggested the building of central prisons where the convicts might be engaged not on manufactures which it condemned but in some dull, monotonous, wearisome and uninteresting work in which there shall be wanting even the enjoyment of knowing that a quicker release can be got by working harder for a time.[11]

However, it is important to note that the report outright rejected reforming forces including moral and religious instruction, education, and any system of incentives for good behaviour in favour of the construction of central prisons and

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[8] *Ibid*.

[9] *Supra* note 1 at 505,506.

[10] *Supra* note 7 at 408.

[11] Report of the Indian Jail Committee, (1919-1920) 29 *available at*: https://jail.mp.gov.in/sites/default/files/Report%20of%20the%20%20Indian%20Jail%20Committee,%201919-1920.pdf (last visited on Oct 12, 2022).

more stringent conditions for detention therein.[12] In 1846, Agra saw the construction of the first central prison. Central Prisons in Bareilly and Allahabad, Banaras, and Fateghat followed this in 1848, 1864, and 1867, respectively. In the province of the Northwest (present-day Uttar Pradesh), the first Inspector General of Prisons was appointed.[13]

The ongoing high death rate in jails, as well as related problems, associated with the management of the jail, moved the government to form the second committee in March 1864 to examine the issues related to prisons. The committee recommended, *inter-alia*, for dietary improvements, clothing, bedding, routine medical inspection, separation of juveniles from other prisoners, and providing education to them.[14] There was a lot of debate in 1864 about whether or not jails should have association barracks or cellular accommodations. Since we have seen above the Pennsylvania and Auburn Model which was based on solitary confinement. Like, in England, India too adopted cellular accommodation as suitable for prison life.[15]

Subsequently, in 1870 the Prisons Act was passed to amend existing prison laws in the country. It is important to note that the Act included the provision for the separation of prisoners – males from females, children from adults, and criminals from civil. The Act enumerated the list of prison offences. This Act came into force on December 1, 1970, and it tried to incorporate the recommendation of the committee of 1864.

The third inquiry into prison administration was set up in 1877 which comprised the officials entirely engaged in prison work to review the management of jail broadly. The report of the committee has been described as a "valuable document" with respect to the conditions of prisoners at that time. Further, in 1889, the fourth such committee was established to examine the administration of the prison. The routine working of jails was in the direct purview of the enquiry. This task was entrusted to two experienced jail officials viz. Dr. Walker and Dr. Lethbridge. The report submitted by them and supplemented by the 1892 committee, together, drew proposals with respect to prison offences and punishments which were subsequently incorporated in the Prison Act of 1894 (hereinafter 'the Act") [which is still in use]. [16]

The Act provided, *inter-alia*, for fixed hours of labour for each day and defined prison offences further and laid punishment therefor. The Act was based on the principle of deterrence rather than on the treatment of prisoners. The Reformatory Schools Act, which was passed in 1897, instructed the court to send "youthful offenders"—boys convicted of crimes carrying a sentence of imprisonment or transportation and who were under the age of 15 at the time of conviction—to a Reformatory school rather than a jail.[17]

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[12] *Ibid*.
[13] S.K. Pachauri, "History of Prison Administration in India in 19th century: Human Rights in Retrospect" 55 *Proceedings of the Indian History Congress* 492,493 (1994) *available at*: https://www.jstor.org/stable/44143401 (last visited on Oct 9, 2022).
[14] *Ibid*.
[15] *Supra* note 7 at 409.
[16] *Supra* note 11 at 30.
[17] *Supra* note 7 at 411.

The 1919 Jail Committee, in order to give a comprehensive report with respect to the prison administration, studied the prison system of England, Scotland, Japan, Philippines, and Hongkong and suggested wider changes in different aspects of the prison administration. The Report of the Indian Jails Committee made it very clear that –

> When it comes to the reformative aspect of prison work, the Indian prison system has lagged behind. It has so far failed to treat the prisoner as an individual and has instead thought of him as a segment of the jail's administrative system. It has a little lost sight of the effect which humanising and civilising influences might have on the mind of the individual prisoner…The whole point of view needs to be altered, not merely isolated details, and the primary duty of keeping people out of prison needs to be more clearly recognised by all authorities and not least by courts.[18]

The Report included a huge number of recommendations, including, for prison staffs, separation of prisoners and their classification, prison labour, discipline and punishment, reformatory influences, medical administration, borstal treatment etc. The Report exhaustively addressed the lacunas existing at that point of time, however, it is important to note that for the first time the principle of reformation was focussed upon rather than deterrence. The Report gave an immediate push to reforms across Indian prisons. Although, the report recommended changes of far-reaching consequence but it did not actually come into effect. We also need to look at this timeline the beginning of the 20th century when the struggle for getting Independence was at the highest and during which many leaders of these movements were arrested and sent to prison and they who visited these places criticised it heavily for the lack of basic necessity inside these cells and complained of the inhumane tortures and degrading environment of prison. This is also one of the reasons for the foreign government to change their attitude by placing their emphasis on reformatory approach. Notwithstanding, the attitude of the aliens remained the same towards the locals which did not really bothered them at all.

Prison Reforms: Post-Independence

It is important to realize that India was for about two centuries governed by an alien power that wielded power over the natives of our country and suppressed them in every possible way. But, in the end, they had to make retreat by transferring power to the dominion government of the time, however, in all their subjugation, and suppression; they aided, indirectly, to unite the very many states into a country. Following this, our country became independent and the people became sovereign. The people of India formulated a constitution to be governed by and they gave it themselves the very constitution they formulated.

The constitution embodies 395 Articles, 22 parts, and 8 Schedules (now 12 schedules). This constitution guaranteed various rights to the citizens and some to the non-citizens as well. The long and short of it is that it guarantees certain rights as fundamental ones which cannot be altered, without following the procedure established by law. Similarly, the rights of prisoners with respect to a few of these fundamental rights still survive inside the prison since "prisons are

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[18] *Supra* note 11 at 32.

built with stones of law" and in *Batra*[19], the Supreme Court ruled that "prisoner in jail still retains his fundamental rights and it does not flee the person as he enters the prison albeit they may suffer shrinkage necessitated by incarceration." According to Justice Douglas, unless their liberty has been constitutionally restricted by procedures that adhere to all due process standards, prisoners are still "persons" with all the constitutional rights. To make it clearer, he added, that "*conviction of a crime does not render one a non-person whose rights are subject to the whim of the prison administration, and therefore, the imposition of any serious punishment within the prison system requires procedural safeguards*."

After coming of the Constitution into effect, "Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other states for the use of prisons and other institutions" at entry 4 was placed under List II (i.e. State List) of the seventh schedule of the Constitution.

Pakwasa Committee was the first committee to come up in 1949 after independence which recognized the right to work for prisoners and recommended against intensive supervision over them. It also suggested payment of wages against the labour of prisoners apart from their early release from punishment on the basis of their good conduct.[20] The next step in direction with regard to prison reform was taken with the view of making Indian prisons at par with international standards and therefore Dr. W.C. Reckless, a technical expert on Crime Prevention and Treatment of Offenders, was invited by the government to suggest measures to reform the state of Indian prisons. He was called in pursuance of the Technical Assistance Programme in India. Apart from submitting a Report on prison administration, he also undertook a six months training programme for jail officials. The chief recommendations were –

1. Establishment of Central Bureau of Correctional Service (CBCS),
2. Use of parole and probation to minimise prison population and burden,
3. Establishment of aftercare units for offenders to aid their settlement in the society post their release,
4. Abolishment of solitary confinement,
5. Classification of prisoners,
6. Periodic revision of jail manual.[21]

The All-India Jail Manual Committee, 1957 was set up by the government to draft a uniform prison manual with a view to maintain homogeneity across all prisons of the nation and to ensure that they follow reformative measures with respect to the administration of the prison. As per their mandate, the committee made far-reaching recommendations including the use of modern methodologies, probation, after-care, juvenile, reformatory school, borstals, etc. The Report was submitted by the committee in 1960 and was accepted, consequently, as the Draft Prison Manual. With the combined effort of this committee and of Dr. Reckless's Report, The Ministry of Home Affairs, Government of India, founded CBCS in 1961.[22] The Bureau's main functions were to coordinate and develop a uniform

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[19] *Sunil Batra* v. *Delhi Administration and ors*, (1978) 4 SCC 494.
[20] Sahibnoor Singh Sidhu, Utkarsh Mishra, "Prison Reform in India – An Incomplete Saga" 6 *Journal of Positive School Psychology* 2235 (2022).
[21] *Ibid*.
[22] *Id* at 2236.

policy, to standardize the collection of statistics on a national scale, to exchange information with foreign governments and United Nations agencies, and to encourage study, training, research, and surveys in the areas of criminal justice, offender treatment, and crime prevention.[23]

Again, in 1980-83, Under Justice A.N. Mulla's chairmanship, the All-India Committee on Jail Reforms was founded. The Mulla committee concentrated on reformist strategies that must be applied in jail administration and recommended rectifying historical flaws in order to address present difficulties. He proposed the establishment of an all-Indian service under the name Indian Prisons and Correctional Service for the purpose of hiring jail administration officials directly. He underlined the need to separate juvenile offenders from hardened criminals amongst other suggestions of which a few are given hereinunder –

1. Improvement of prison conditions by better food, clothing, sanitation, ventilation etc.
2. Proper training of prison staffs
3. Focus on after-care, rehabilitation, and probation
4. Media and public to be allowed in prisons for periodical visits
5. Reduction of lodging under-trials in jails
6. Adequate resources and funds to implement reforms.[24]

One more important committee regarding prison reforms is of Justice Krishna Iyer committee of 1987. The setting up of this committee was monumental in the history of prison reforms and administration since it looked at one aspect which was missing throughout was of the women prisoners and their plight. The committee's top recommendation was to increase the number of female officials in prisons in order to somewhat improve the situation of women detainees. Further, it recommended –

1. Provision of national policy for women prisoners in India;
2. Fresh enactment of rules and regulations for punishment and conduct of women prisoners;
3. Free Legal Aid to women;
4. Separate prisons;
5. Provision for proper care of a child born inside the jail and their diet.[25]

Prison Reforms: Judicial Trend

Democracy thrives on its three pillars viz. legislature, executive, and judiciary. The pillars, although, following the doctrine of separation of power but it is not carved in stone and therefore the pillars also work as an independent authority to keep a check and balance on the other. Similarly, the prison and its care fall under the domain of the earlier two pillars viz. legislature and executive, wherein one formulates laws with respect to prison and the other takes the task to see and make sure that it is followed on the ground. The judiciary only gets

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[23] *Supra* note 7 at 415.

[24] Bureau of Police Research & Development, " 1 Implementation of the Recommendation of All-India Committee on Jail Reform" (1980-83) *available at*: https://www.mha.gov.in/MHA1/PrisonReforms/NewPDF/Mulla%20Committee%20-implementation%20of%20recommendations%20-Vol%20I.pdf (last visited on Oct 11, 2022).

[25] *Supra* note 20 at 2238.

involved at a later point of time, when the first two pillars fail in their task. The prisons, a creation of an act made by legislature i.e. the Prisons Act of 1894 – an outdated law though still in use after a century has passed and also when the country is celebrating its 75th year of Independence – is a reminder that the legislature has not performed its task diligently as it should have. The executive is busy in enforcing this law which was created by an alien country for their good. Hence, the role of judiciary becomes crucial to safeguard the rights of prisoners along with maintaining the balance in the society so that the interest, at one hand, of the prisoner and, on the other hand, that of the society does not comes into conflict. Therefore, the Supreme Court have time and again responded to the calling times and by rising to the occasion have even issued directives and guidelines to reform the prisons in order to ensure basic human rights to the prisoners.

The Supreme Court has also noted in this regard to use its power when required or called upon to do so, in these words –

> Where injustice, verging on humanity, emerges from hacking human rights guaranteed in Part III and the victim beseeches the court to intervene and relieve, this court will be a functional futility as a constitutional instrumentality if its gun do not go into action until the wrong is righted. The court is not a distant abstraction omnipotent in the books but an activist institution which is the cynosure of public hope.[26]

In *State of Maharashtra* v. *Prabhakar*[27] the court took the aid of Article 21 to grant the prisoner the right to read and write books while in jail. In *Batra* (*supra*) the court decided on solitary confinement to a prisoner on death row and keeping prisoners in fetters and shackles all the time. The court opined that "such a treatment is so cruel that the use of such restriction as punishment is a curse to the spirit of the Constitution". It held that the prison manual does not provide the prison authority the right to place a prisoner serving a death sentence in solitary confinement.[28] In *Sunil Batra II*[29], the Supreme Court was deciding the issue pertaining to inhumane torture of one inmate by a jail warden to extract money from his visiting relative. The court noted that 'the peril to prison rights is from the uninstructed personnel' and it directed the government to insist on the professional requirements of familiarity with prison laws for warders and wardens. Noting, the reformatory goal of imprisonment, the court said –

> The goal of imprisonment is not only punitive but restorative, to make an offender a non-offender…Rehabilitation is a prized purpose of prison 'hospitalization'. A criminal must be cured and cruelty is not curative even as poking a bleeding wound is not healing. Social justice and social defence – the sanction behind prison deprivation – ask for enlightened habilitative procedures.

The court also emphasized on its responsibility to make it explicit that prisoners are persons and not animals in the eye of the law as was noted the meaning of 'life' by Field J., as

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[26] *Sunil Batra II* v. *Delhi Admn.,* (1980) SCC (3) 488.
[27] AIR 1966 SC 424.
[28] *Supra* note 19.
[29] *Supra* note 26.

> "Something more than mere animal existence. The inhibition against its deprivation extended to all those limbs and faculties by which life is enjoyed. The provision equally prohibits mutilation of the body by the amputation of an arm. Or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.[30]

In view of the challenges faced by prisoners and the immediate issue at hand the court held that, indeed, the prisoner was tortured illegally and further held that the Superintendent cannot absolve from its liability even though he was not a direct party and said – "Lack of vigilance is limited guilt".

In myriad judgments, the Apex court has held that there is right to speedy trial of under-trial prisoners. In *Undertrial Prisoners* v. *Union of India*[31], the court was dealing with the detention of under-trials in cases of the Narcotic Drugs and Psychotropic Substances Act (NDPS). Noting the stringent provision regarding bail in the NDPS Act, the court directed release of under-trials who have already undergone a period exceeding half of the maximum punishment prescribed under the Act.

The catena of judgements delivered by the highest court has, undoubtedly, helped evolve policies related to prison management and administration apart from the existing laws to govern our prison system. However, it is important to keep in mind that, although, a lot of measures has been evolved and employed to deal with the prison administration but the challenges more or less has remained and therefore we need to look at these challenges afresh so that some constructive suggestions could be forwarded to redress, if not all, then a few of them completely.

Challenges:

Before embarking on this journey to find out the issues or problems or challenges with respect to prison administration, we need to take a look at the current prison statistics to help us understand the current situation of the Indian prisons.

Prisons – Types & Occupancy

Year	No. of Prisons	Actual Capacity of Prisons	No. of Prisoners at the end of the year	Occupancy Rate at the end of the year
2019	1,351	4,00,934	4,81,387	120.1%
2020	1,306	4,14,033	4,88,511	118.0%
2021	1,319	4,25,609	5,54,034	130.2%

*As per Prison Statics India – 2021[32]

The above data show an interesting picture of the reducing number of prisons and the rising population of prisoners on the other hand. This is when the government, committees and various Supreme Court judgments have emphasized, time and again, upon increasing number of prison institution and reducing number of prisoners. Also, the interesting thing to note is that from the

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[30] *Id* at 21.
[31] 1994 (6) SCC 731.
[32] National Crime Records Bureau, "Prison Statistics India" (2021).

above data is although the number of prisons reduced over the years but the actual capacity of prisons has actually increased.

Prisoners – Types & Demography

Year	No. of Convicts	No. of Undertrial Prisoners	No. of Detenues	No. of Other Inmates	Total No. of Prisoners
2019	1,44,567	3,32,916	3,223	681	4,81,387
2020	1,12,589	3,71,848	3,590	484	4,88,511
2021	1,22,852	4,27,165	3,470	547	5,54,034

The above data provide that the number of convicts from 2019 to 2021 has reduced whereas the number of under-trial prisoners have went up within the same period, meaning thereby, that more of under-trials lodged in the prisons knowing the prison condition, especially, in the wake of deadly Covid-19 virus and its two deadly waves and its continuous impact on the population at large without discriminating between prisoners and non-prisoners. Taking note of the situation and to minimise its effect on prisons, the Supreme Court of India took Suo moto cognisance in the form of writ petition titled as *In Re: Contagian of Covid 19 Virus in Prisons* and directed all states and UTs to constitute a high powered committee for release of prisoners. It was done with the view to upheld Article 21 which talks of right to life and therefore the jails be decongested to improve conditions within the jail and to ensure that the guidelines issued by the government in this regard be complied with.[33] The highest number of prisoners (1,17,789) are reported from Uttar Pradesh forming 21.3% of the total inmates throughout the country followed by Bihar (66,879), Madhya Pradesh (48,513) as on Dec 31, 2021.[34]

Prisons – Type, Capacity and Actual Population

S. No.	Type	No. of Jails	Capacity	Population of Inmates	Occupancy Rate
(1)	(2)	(3)	(4)	(5)	(6)
1	CENTRAL JAIL	148	193536	239311	123.7
2	DISTRICT JAIL	424	163606	254214	155.4
3	SUB-JAIL	564	45436	46736	102.9
4	SPECIAL JAIL	41	7473	6582	88.1
5	OPEN JAIL	88	5953	2178	36.6
6	WOMEN JAIL	32	6767	3808	56.3
7	BORSTAL SCHOOL	19	1775	745	42.0
8	OTHERS	3	1063	460	43.3
	TOTAL	**1319**	**425609**	**554034**	130.2

The number from the data presented above taken from the latest NCRB data with respect to prisons very clearly demonstrates that the overcrowding of prisons is a major challenge faced by our nation. However, the issue of

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[33] Radhika Chitkara, Vikas Kumar, "Decongest Jails: PUDR issues statement amid the Covid-19 Pandemic" 55 *Economic and Political Weekly* (2020) *available at*: https://epw.duelibrary.in/engage/article/decongest-jails-pudr-issues-statement-amid-covid (last visited on Oct 14, 2022).

[34] *Supra* note 32.

overcrowding is not a new or recent phenomenon or something which only happens in our country. The British prison also has this challenge and it was noted by two authors that "overcrowding is rife and endemic, and is frequently presented as the major source of the problem facing the prison service."[35]

In *Rama Murthy* v. *State of Karnataka*[36], the Supreme Court identified as many as nine issues, which were – (i) Overcrowding; (ii) Delay in Trial; (iii) Torture and Ill-treatment; (iv) Neglect of health and hygiene; (v) Insufficient food and inadequate clothing; (vi) Prison vices; (vii) Deficiency in communication; (viii) Streamlining jail visits; (ix) Management of open air prisons. Further, the Supreme Court noted four major issues among 1382 prisons – (1). Overcrowding; (2). Unnatural death of prisoners; (3). Gross Inadequacy of Staff; (4). Existing staff is untrained or inadequately trained.[37]

A. Overcrowding

From what we have seen above in the previous sections of this chapter, it is pretty much clear from the various committee reports, one thing which runs as a common thread from the beginning till today – the Indian prisons have remained overcrowded – and that has been one of the serious challenges faced by the Indian prison system. Overcrowding promotes poor living conditions. Further, it also contributes the transmission of many communicable diseases. As we have seen during the covid-19 pandemic, overcrowding leads to serious transmissions among the prisoners as well as the staff. Apart from this, when prisons are overcrowded, prisoners' lives are tougher, and staff members' jobs are more challenging.

The Mulla Commission discovered that the majority of inmates were from "rural and agricultural backgrounds" and that first-time offender who committed "technical or petty violations of the law" made up a sizable portion of the jail population. It also stated that many people had been imprisoned for failing to pay fines or because there was no one to bail them out. As a result, these first-time offenders or those detained for minor offences spent years or even decades hanging out with hardcore offenders.[38] Also, the under-trials trial, do not necessarily end up with a conviction and therefore the need of the hour is to decongest the prisons by constructing separate prisons for under-trial prisoners so that they do not get exposed to the influence of the hardened criminals convicted of heinous crimes. The classification of prisoners can help separate the un-convicted prisoners from the rest of the convicted prisoners.

Looking at the data from the "Crimes in India", it is noteworthy to mention that during 2021, there was a total of 58,10,088 IPC cases (comprising 21,42,907 cases pending from the previous year + 36,63,360 cases reported during the year + 3,821 cases re-opened for investigation) were under investigation, out of which total of 37,64,632 cases was disposed of by the police and in 27,20,265 cases were

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[35] Mike Fitzgerald and Joe Sim, *British Prisons* 16 (Basil Blackweel, Oxford, London, 2nd edn., 1982).
[36] AIR 1997 SC 1739.
[37] *In re, Inhuman Condition in 1382 Prisons*, AIR 2016 SC 993.
[38] Ritu Kumar, Smriti Manocha, *et.al.* (eds.), Report on the National Consultation on Prison Reform 5 (2010).

charge-sheeted during this year.[39] This shows that an enormous amount of cases getting reported every year from every state and UTs of the nation and consequently, the cases reaching at various stages of investigation, inquiry, trial, etc., meanwhile people get arrested also as under-trials, inflating the pool of under-trials further inside the prisons. It is also striking to note that out of the 36,63,360 cases of IPC crimes reported this year, a total of 34,92,436 persons were arrested – which is an alarmingly high rate of arrest.[40] As per the prison statistics of 2021 approximately 77% of the total prisoners are under-trials who are awaiting trials.

The Law Commission defined the expression 'undertrial prisoners' to even include persons who are in judicial custody on remand during the investigation. The various recommendation made by the Commission included *inter-alia*, expeditious disposal of cases (by strengthening the judiciary by manning with adequate judicial officers, eliminating delays, etc.); expansion of the category of bailable offences (like amending IPC to make offences punishable up to 3 years as bailable rather than non-bailable without compromising with the public interest); the amount of bond should not be excessive; provision to release on a bond without sureties; arrangements for separate detention of undertrial prisoners from convicts to save them from the deleterious effect on the under-trials, etc.[41]

It was also suggested that measures be taken like the introduction of plea bargaining, fast track courts, Lok Adalat, compounding of offences, the introduction of section 436 A of the Code of Criminal Procedure Act, 1973 by the CrPC (Amendment) Act, 2005, and production of accused before the court directly or via videoconferencing.[42]

B. Corruption and Extortion

Corruption pervades multiple levels of the prison administration system, primarily involving on-duty guards and local contractual prison staff, who help prisoners to smuggle inside the prison things that otherwise would not be legally available for a certain price. Shri Kuldip Nayar wrote in his book named "In Jail" that there was nothing which money could not buy within the recesses of the prison campus. He also added that "if one could pay the jail functionaries one could have all the comforts one sought". Justice Krishna Iyer noted that the "Corruption inside the prison was ordinarily through bribing wardens to smuggle into jails beedis and other articles, freely available in the market but totally banned inside jails."[43]

If we glance back a bit, we would realise that the case of Batra II was related to extortion by the warden which resulted in the inhumane torture of the prisoner by the warden. The crimes committed by the keepers of it are the worst

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[39] National Crime Record Bureau, "Crimes in India" (2021).
[40] *Ibid*.
[41] Law Commission of India, "78th Report on Congestion of Under-Trial Prisoners in Jails" (February, 1979).
[42] Bhim Singh v. Union of India, (2014) 14 SCC 545
[43] V.R. Krishna Iyer, *Leaves from My Personal Life* 50 (Gyan Publishing House, New Delhi, 2017).

The problem of corruption in Indian prisons is a long-standing and entrenched problem. The only administrative steps used thus far to combat claims of corruption are inspections, surprise visits, examination of the annual property returns of jail staff, and a detailed investigation of written complaints of corruption. In addition to this internal system, many state government's anti-corruption agencies have taken action against corrupt prison staff. A prison is a closed institution and rarely do corrupt acts inside prison walls become known to the outside world. This makes combating corruption in jails more complex and challenging. Along with being honest, the top management in the prison division has to be aggressive in combating corruption. Transparency in jail administration within the bounds of security would be another step. Reforming prisons in all of their facets would be a crucial first step in the battle against corruption.

C. Unsatisfactory Living Conditions

The administration and upkeep of prisons come under the purview of the State List under the seventh schedule and hence the state takes all the policy measures to maintain prisons and make laws with respect thereto. This is also one of the challenges as to why the law regarding prisons has not been amended so far since the states, initiate measures to reform prisons, according to their convenience or availability of resources to carry out this task. The overcrowding, though itself a bigger challenge, also poses several challenges on the other aspect of living in prisons like to meet the requirements – for proper medical facilities, maintaining hygienic conditions inside prisons, ensuring proper food to prisoners, etc.

Kiran Bedi narrated the story of the riot which occurred in Tihar Jail in 1990 where nine inmates were killed following a four-hour battle between prisoners and the security staff. The root cause of the issue was the death of a person who was seriously ill during the night and despite the uproar of prisoners, no doctor reached the patient for treatment, and consequently, he died. After his death, nobody came to remove the dead body until the next morning, and meanwhile, the prisoners went berserk. The incident claimed ten lives and rather than improving the condition of medical services, one VIP who came to visit prisons committed to punish the guilty.[44] She also accounts that since one medical doctor could not have possibly coped with hundreds of calls he received from all the four jails in the night, what he used to do was to send one common medicine named Paramol (a cheaper form of Paracetamol) to all the patients. She also described another doctor who used to prescribe Sorbitrate (a heart medicine) for minor disorders like headaches. She added that there was yet another doctor who used to prescribe TB drugs at random to anyone who consulted him.[45]

The Prisons Act's Sections 37, 39-A, 39-B, and 39-C deal with sick inmates and mandate that prisoners be questioned about their health upon entrance, particularly with regard to TB and AIDS and the medical history of the same so that such prisoners should be provided special treatment and also to segregate them from the rest to ensure that it doesn't spread any further. However, the one

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[44] Kiran Bedi, *It's Always Possible: Transforming One of the Largest Prisons in the World* 66 (Sterling Publishers Pvt. Ltd., New Delhi, 1st edn., 1998).
[45] *Ibid.*

incident which happened inside Tihar was only where a businessman named Rajan Pillai died due to lack of proper medical attention. The Justice Leila Seth Commission of Inquiry noted that 'too little was done and that too very late' also the doctors who examined him in prisons were casual and careless in their professional duty and it was their negligence that resulted in giving him hardly any chance of survival.[46]

"These recommendations were made by the National Human Rights Commission (NHRC) at the 2011 National Seminar on Prison Reforms.[47]:

1. Prisons should have a more efficient medical system. They should compulsorily conduct a check-up of detainees while they are brought to jail and then regularly conduct a check-up. Their medical records should be maintained punctually.
2. There is an urgent need to upgrade sanitary, hygiene, and drinking water amenities in prisons across India.
3. Detention centers should become more women-friendly, with similar facilities being bestowed on the aged and mentally ill prisoners.
4. There should be a greater focus on mentally ill detainees. They should be segregated from regular prisoners, as their hygiene needs are different.
5. Regular exercise and yoga sessions should be conducted in conjunction with NGOs.
6. There should be regular cleaning of the sewage system minus human help for cleaning septic tanks wherein mechanical means should be encouraged."

D. Criminality inside Prisons

One of the main issues with prison discipline is the high level of crime among inmates since their biological requirements are neglected due to their extended separation from family and society. Not able to fulfill it, the prisoners involve themselves in unnatural offences like homosexuality[48], sodomy, etc. Some countries give periodical conjugal visit rights to the prisoners to suppress the menace and eliminate crimes of this nature inside prisons. It could be adopted in our country also to deal with this kind of criminality inside prisons. However, other penologists are against the idea since prison is punishment and therefore this deprivation is necessary sequitur to prison life. Conjugal visits are not permitted in Indian prison management because the furlough and parole systems serve better purposes for maintaining marital bonds between spouses. Apart from that, such conjugal visits are morally and ethically unacceptable in light of Indian beliefs and cultural standards. To preserve the harmony of their families, the Prison Act of 1894 allows for the release of inmates on furlough and parole.[49]

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[46] Leila Seth, *On Balance* 384 (Penguin Random House India, Gurgaon, 2007).

[47]Minutes & recommendations of the national seminar on 'prison reforms' held at India habitat centre, New Delhi (15th April, 2011) , available at: http://nhrc.nic.in/documents/minutes%20&%20reco%20prison%20reform.pdf

[48] After *Navtej Singh Johar* v. *Union of India*, homosexuality amongst consenting adults was decriminalised following this judgment.

[49] *Supra* note 1 at 514.

The fight inside prison walls is yet another cause of criminality among prisoners due to quarreling inside the institution often arising out of trifles but they promote criminality. Petty thefts are also common inside prisons, often, the items stolen are of basic necessity like soap, oil, utensils, etc. There is common distrust among the prisoners as well as with the prison authorities – since they are the people which illegally provide inmates with things not allowed in the jails and later they also inspect them to recover those illegal items.

In *Virendra Singh v State of Punjab*[50], on September 17, 2009, the appellant visited the central prison in Firozpur, Punjab. Upon being searched, a cell phone and a charger were found in his turban and shoes, respectively. He was charged for violating Sections 42 and 45 of the Prisons Act of 1894. In this case, the supreme court stated that the prison (Punjab Amendment) Bill, 2011 did provide for the addition of a new section 52-A to the ACT, which will make owning, operating, or using a mobile phone or its component parts, such as sim cards, memory card batteries, or chargers, as well as any person aiding, abetting, or instigating the supply thereof, a crime punishable by imprisonment for a maximum of one year, or with fine not exceeding Rs 25,000 or with both.

In November 2021, the Supreme Court expressed regret for the situation in Tihar Jail, saying it is a "sorry state of affairs" in Tihar Jail. The court said that It had devolved into a haven for criminals where murders were occurring. The home ministry was mandated by the court to act right away to enhance jail administration. The Ministry of Home Affairs' failure to provide an action plan and a report on the actions taken in response to the recommendations made by Delhi Commissioner of Police Rakesh Asthana was also criticized by the apex court. The bench of justices DY Chandrachud and MR Shah stated that “there need to be body scanners to ensure that there is no unauthorised use of a mobile phone inside the prison.”[51]

E. Prison Discipline

The word "discipline" has frequently been used interchangeably with some of the methods employed to accomplish it. A group order is "discipline." Exaggerated discipline is a traditional trait of prisons.[52] The biggest challenge which comes to the jail authorities relates to maintaining prison discipline amongst persons who are convicted and other prisoners who are alleged to have committed some crime or other. Group orders can be produced using a variety of methods. From institution to institution, philosophy to philosophy, and administrator to administrator, practices differ greatly. In many institutions, punishment is the approach that is most frequently used, often without any knowledge of how it should be applied. Punishment methods serve a useful purpose in maintaining prison discipline, but they must be used with caution and with good judgment or they risk doing more harm than good. The idea to discipline a class comes easily as the teachers need quiet to teach students and hence it is the basis to perform the task of teaching. On the other hand, though, it is

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[50] *AIR 2014 SC 1817*

[51] *Bhupender Singh* v. Unitech Ltd., (2021) SCC online SC 320.

[52] Vernon C. Branham and Samuel B. Kutash, *Encyclopedia of Criminology* 667 (New York, Philosophical Library 1949).

necessary to discipline an unruly lot of prisoners but it becomes very difficult with a staff that is highly disproportionate to the number or prisoners lodged inside the jail. Nonetheless, the authorities do try their best to maintain discipline and contain any brewing conflict in order to run the prison administration smoothly. The prison act provides for "convict officers" as a prisoner who is appointed as 'officer of prisons.[53] This was done to maintain discipline since the prisoners are most likely to listen to one of them rather than the officers of prisons. In this regard, the job of "Convict Officers," who are prisoners chosen by the prison administration to assist in maintaining order and discipline in the jail, is instructive. These people not only carry out a crucial physical task but also act as a crucial conduit between the prison staff and the prisoners. This dual approach can be used to assess the options for productive employment of various kinds in the larger Central Prisons. It is significant to highlight that this activity is not "hard labour" in the sense that the term is typically used to describe incarceration. Instead, inmates are given the chance to work in skilled or semi-skilled jobs like carpentry, cooking, baking, or working with textiles and are paid for it. On the one hand, this accomplishes the stated goal of rehabilitation and equipping them with the abilities needed to reintegrate into society; on the other hand, it gives the prison authority access to a pool of people who have a strong interest in upholding order and friendly relationships inside the prison.

F. Challenges Faced by Under-trial Prisoners

The problem faced by undertrial prisoners is huge since sometimes they had to languish their lives specially when there is no one outside to look for their welfare. As a result, they spend much longer time in prisons than the maximum term for which they could have actually punished. Many of the prisoners are innocent persons who are caught and they get entangled in the web of the judicial administration system which is also burdened and therefore the innocent persons become the victim of the process. The prolonged police investigation, inadequate legal representation to the accused, Indiscriminate arrests, busy schedule of court, and unsatisfactory bail conditions – are a few reasons for the plight of undertrial prisoners.

The *Prison Statistics India Report, 2021* indicates that 77.10% of India's prison population comprises undertrial prisoners. Out of India's total of 5,54,034 prisoners as on 31 December 2021, reportedly 4,27,165 inmates were undertrials.[54] Jails overflowing with undertrial prisoners most of whom are from poor and marginalized communities. Out of a total of 4,27,165 undertrial prisoners, 66.37% are from SC, ST, and OBC communities.[55]

An overwhelming majority of the undertrials (64.69 per cent) are either illiterate or have not completed Class 10th. Of these, 25.27 per cent (1,07,946) of undertrial prisoners were reported to be illiterate and 39.42 per cent (1,68,420) dropped out of school before passing Class 10th. In the absence of data regarding the economic status of prisoners, these numbers serve as a useful proxy to

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[53] The Prisons Act, 1894, s.23.

[54] National Crime Record Bureau, "Prison Statistics India 2021" available at: https://ncrb.gov.in/sites/default/files/PSI-2021/PSI_2021_as_on_31-12-2021.pdf

[55] Ibid.

appreciate that the majority of undertrial prisoners belong to socio-economically marginalized groups and are thus more vulnerable to poor legal representation, and therefore to extended periods of incarceration.[56]

In its *268th report*[57], the Law Commission of India, headed by Honourable Mr. B.S. Chauhan J. former judge of the Supreme Court had viewed that over 60 percent of arrests are unnecessary. The report recommended that "Unnecessary pre-trial confinement should be minimized. Confinement is detrimental to the person accused of an offence who is kept in custody, imposes an unproductive burden on the State, and can have an adverse impact on future criminal behaviour, and its reformative perspectives will stand diminished." The Supreme Court in *Joginder Kumar v. State of UP*[58] has cautioned that arrest should be treated as an exception and not the rule and that just because the police have the power to arrest, does not mean that they should do so in each and every instance. The main issues addressed by pre-trial imprisonment are those of liberty, justice, and public safety. The impoverished become the victim of this pre-trial detention since they cannot afford sureties and stand personal bonds. Justice Krishna Iyer succinctly puts the plight of pre-trial detention as –

> The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to psychological and physical deprivation of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.[59]

The Supreme Court in *Hussainara Khatoon* v. *Home Secretary, State of Bihar*[60], expressed its anguish over the distressing condition of undertrials in Bihar jails and observed that "incarceration of undertrials who had virtually spent their period of the sentence was clearly illegal and a blatant violation of their fundamental rights guaranteed under Article 21 of the Constitution of India." As many as 18,000 under-trial prisoners were released, pursuant to the direction of the Apex Court in the aforesaid case. The court also read the concept of the speedy trial into Art. 21 as an essential part of the fundamental right to life and liberty guaranteed under the Indian Constitution. The Right to Speedy Trial is violated due to protracted delays. This delay is due to various reasons such as:

1) One of the major causes for delays in disposal of cases by the justice system is 'adjournments.

2) Inadequate number of judges and prosecutors. Staff shortages amongst the judiciary have similarly impacted the speedy resolution of cases.

3) "Remands being extended mechanically" by the presiding judge due to lack of time and patience.

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[56] Ibid.

[57] Law Commission of India, "268th Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail" (May 2017). Available At: https://lawcommissionofindia.nic.in/reports/Report268.pdf (Last visited: 10.11.2022)

[58] (1994) 4 SCC 260

[59] *Moti Ram* v. *State of Madhya Pradesh*, (1978) 4 SCC 47.

[60] AIR 1979 SC 1360.

The Supreme Court of India in *Motilal Saraf v. Jammu & Kashmir*[61] observed that "The right to speedy trial begins with actual restraint imposed on arrest and consequent incarceration and continues at all stages, namely the stage of investigation, inquiry, trial, appeal, and revision so that any possible prejudice that may result from the impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality can be averted".

Recently in 2021 the Supreme Court in the case of *Union of India v. K.A. Najeeb*[62], held that "the Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India*[63], it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life was to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."[64]

G. Custodial Torture

"During the pandemic, the mass incarceration of undertrials led to a humanitarian crisis in overcrowded prisons. As prisons instituted a lockdown on public accountability, the rates of custodial deaths increased by 7.0 per cent in 2021. So-called unnatural deaths, which include suicides, accidents, and murders in prisons, increased by 18.1 per cent. There is no information on why 52 inmates died in 2021. These figures prove that the lockdown rules in prisons increase custodial violence and disease."[65]

According to prison statistics India, 2021, a total of 9,180 inmates were reported as mentally ill, and out of 9,180 inmates suffering from mental illness, 58.44 percent (5,365) were undertrials. The custodial torture at the hands of prison authorities is a known fact and the Apex Court in catena of judgments has issued directions and guidelines to put an end to it, nonetheless, it thrives inside the walls of the prison. The victims of custodial torture have the right to move, directly, to the Supreme Court under Article 21. Justice Y.V. Chandrachud, observed long ago, that convicts are not deprived of all fundamental rights which they possess by mere reason of the conviction. He further added that a convict is even entitled to the important right of 'life and personal liberty guaranteed under Article 21.[66] Similarly, in *Prabhakar Pandurang*[67] the Supreme Court ruled that

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[61] (2007) 1 SCC (cri) 180
[62](2021) 3 SCC 713
[63](1994) 6 SCC 731
[64] *Union of India v. K.A. Najeeb* (2021) 3 SCC 713
[65] *Supra note* 54 at 183
[66] No person shall be deprived of his life or personal liberty except according to the procedure established by law.
[67] *Prabhakar Pandurang* v. *State of Maharashtra*, AIR 1966 SC 424.

detention in prison cannot deprive the detenu of his fundamental rights. *Sunil Batra* (*supra*) and *Sunil Batra II* (*supra*) also upheld that the prisoners are entitled to all fundamental rights which are consistent with their fundamental rights.

In *Sheela Barse* v. *State of Maharashtra*[68], the Supreme Court was in seisin of a complaint of custodial violence to women prisoners in jail and it directed for legal assistance to those victims of prison injustice at state cost. Also, the court laid down certain directives to safeguard women prisoners in jail as follows –

1. Female prisoners should be separated from male and they should be guarded by female guards.
2. Interrogation of women in presence of women official.
3. Intimation of arrest of women offenders immediately to her relatives.
4. Such intimation also be made to the nearest Legal Aid Committee.

For the better upkeep of the prison administration, it is necessary to provide a adequate training to the prison officials apart from sensitising them about gender issues. This would help to instil confidence of the prisoners in the jail officials and in the long run would be really helpful in maintaining discipline.

H. Rehabilitation of Prisoners

"You cannot rehabilitate a man through brutality and disrespect…If you treat a man like an animal, then you must expect him to act like one. For every action, there is a reaction…And in order for an inmate, to act like a human being you must trust him as such…You can't spit in his face and expect him to smile and – say thank you."

This is one of the letters written by a prisoner and it pretty much sums up the business as usual inside the prisons where the prisoners always get humiliated and tortured for everything said or done averse to the line prescribed by the authorities. In *Sanjay Suri* v. *Delhi Administration*[69], the Supreme Court held that for the sake of humanity, prison officials should adopt a different perspective toward detainees and protect their human rights.

A person is not a criminal by birth. He frequently gets into conflict as a result of his associations with undesirable people. A person can always reform as long as they perceive their reintegration into society as a reward. If accused are not offered such temptations, they will never attempt to change for the better and will remain imprisoned forever. It is to be borne in mind always by the prison staff, and authorities that one or the other day the prisoners have to settle back into society and therefore he or she should be rehabilitated in such a way that he or she becomes an easy fit rather than a difficult one to settle back in the outside world. Therefore, the need to adopt measures would require to bring changes in the overall judicial administration procedure starting from the attitude of judicial officers, police officials then prison officials so that a person in need of care could be given treatment in the prison 'hospitalization'.

Prisons are the most frequently utilised institutions in the field of correctional administration, but their function in the rehabilitation of inmates has always

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[68] AIR 1983 SC 378.
[69] (1988) Cr LJ 705 (SC).

come under intense scrutiny and criticism. The following are the main issues that prevent prison administration from carrying out its rehabilitative tasks[70]:

1. There are no infrastructure facilities and no scientific classification of prisoners.
2. There is rarely any justification for adding to the misery that is already there during the incarceration process, so prison officials should take this crucial factor into consideration while dealing with prisoners.
3. There is no scope for custodial torture in prisons.
4. Since the impoverished, ignorant, and unskilled make up a substantial portion of the jail population, suitable vocational training programs with the required technical inputs should be made available in prison cells.
5. On a case-by-case basis, part-sentence dispositions like furlough, parole, remission, pardon, etc. may be tried as non-custodial measures.
6. Facilities for education and vocational training for prisoners should be prioritised. The government may pay for the distribution of study materials.
7. Some semi-institutional systems for reintegrating prisoners into society, such as halfway houses, educational facilities, daytime employment and training centers, etc., may aid in their rehabilitation process.

Concluding Observations:

The concept of prison arose from the idea that the perpetrator should suffer as a result of the crime he committed. In essence, the aim was to have the accused experience the same amount of suffering that he did to the victim and the collective conscience of society. However, as society evolved and concern for "individual" human rights grew, the rights of prisoners were also recognised. As a result, the concept of using prisons as centers evolved for rehabilitation, reformation, and treatment of inmates in order to help them lead normal lives after being released from custody. The prison system brought to India by the Britishers in the modern times helped to solve a major problem of keeping the deviant characters outside the purview of public at large in the interest of public. Sir Winston Churchill noted with respect prisons as –

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State-a constant heart searching by all charged with the duty of punishment a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it.

The above made statement is full of wisdom and visionary and it also takes into account rights of every party and equally balances them and focuses on reformation through punishment. Marlyn Rees (Home Secretary, 1978) noted that

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[70] Chaturvedi K.C.: *Penology & Correctional Administration* 18 (Isha Books, 1st edn., 2006).

"One sign of success in the fight for law and order is that more people are in prison". If we were to dive a little deeper we will notice the fault lines of the statement in light of the aforesaid discussion.

Positive steps have been taken on this aspect of rehabilitation or reformation through the introduction of Model Prison Manual, 2016 which declares Reformation as ultimate objective. An attempt was made to incorporate a few amendments in 2016 in the Act as well but the law on prison now needs to go and a new law taking note of the time and changes of the time should be brought in.

Justice Krishna Iyer, when he was the jail minister, removed the costume of convicts with the intention to reform them since he believed that every time a prisoner looks at his clothes would remind him of the sentence and what he wanted him to realise was that he was a soul meant to be redeemed.[71]

The handcuffing of prisoners was an usual business but the courts have realised that the handcuffing and fettering a prisoner is barbaric and cruel exercise and it must be done away with. The Supreme Court in the case of *Prem Shankar Shukla* v. *Delhi Administration*[72], observed that, "handcuffing is, *prima facie*, inhuman and therefore, unreasonable and harsh and at the first flush arbitrary…to inflict 'irons' to resort to zoological strategies repugnant to Article 21".

Separating under-trial prisoners from the convicted has been a task which is again running as an issue since the beginning of these prisons and the 78th Law Commission Report also recommended to have a different facility for the undertrial prisoners from that of the convicts since the exposure to these hardened criminals cannot be ensured in the same confinement. Their exposure on the undertrials would have deleterious impact on the undertrial as has been seen in the past.

Prison staffs are acutely unaware and scarcely under trained in prison administration, which was also underlined by the Mulla Commission and what is required is to follow is the recommendation of the committee to bring about positive changes pertaining to the existing situation. It is true that challenges do exist but nonetheless the nation has come so far and has attempted to cater to changing needs of the society.

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[71] *Supra* note 42 at 49,50.
[72] AIR 1980 SC 1535.

ANTICIPATORY BAIL IN INDIA: A CRITIQUE

Amalendu Mishra*

Liberty is said to be the delicate fruit of a mature civilization. Liberty is the very quintessence of a civilized existence ad essential requirement of a modern man.

-John Emerich Edward Dalberg-Acton[1]

Abstract-Personal liberty is a valuable right in our constitutional scheme while arrest and custody are significant restrictions on personal liberty. The provision for anticipatory bail is made to provide an opportunity to a person apprehending arrest to approach courts for protection of personal liberty. This article attempts to incorporate important dimensions relating to anticipatory bail as provided U/S 438 Cr.P.C such as scope of the provisions, issued of jurisdiction discretion of court and enunciation of the law by Hon'ble courts *vis a vis* Article 21 of Indian Constitution.
Keywords-Liberty, Bail, Anticipatory Bail.

Introduction:

Jails in India are flooded with under-trial prisoners. The statics placed before us would indicate that more than 2/3rd of inmates of the prisons constitute under-trial prisoners. Of this category of prisoners of this category of prisoners majority may not be even be required to be arrested despite registration of a cognizable offence, being charged with offences punishable with for seven years or less. They are not only poor and illiterate but also would include women. Thus there is a culture of offence being inherited by many of them. It certainly exhibits the mind-set , a vestige of colonial India, on the part of investigating agency notwithstanding the fact arrest in a draconian measure resulting in curtailment of liberty and thus to be used sparingly .In a democracy there can never be an impression that it is a police state as both are conceptually opposite to each other. The President of India Smt. Draupdi Murmu while gracing the valedictory function of the Constitution Day celebration organised by the Supreme Court of India on 26 Nov2022 expressed her concern about the plight of growing number of under-trial prisoners in India and ask Supreme court to do passionately substantial to eradicate the meek and mute suffering of marginalised people

Bail and its Objectives:

The word bail has been defined in the Black's Law Dictionary[2] as: "A security such as cash or bond especially security required by a court for the release of a prisoner who must appear in court at a future time" The term 'Bail' has not been defined in the Criminal Procedure Code 1976 though is used very often. It is conditional order of court which released suspect on his solemn undertaking that he would cooperate both with the investigation and the trial. *In re Nagendra Nath Chakravarthy*[3], the Hon'ble High Court of Calcutta observed that the object of bail is to secure the attendance of the accused at the trial that the proper test is to be applied in the solution of the question

***LL.M., NET**

[1] John Emerich Edward Dalberg-Acton, *Essays on Freedom and Power.* The Beacon Press 1949 at 30.

[2] 9th Edition Page 160

[3] AIR 1924 Cal 476

whether Bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as punishment.

In *Gudikanti Narsimhulu v. State*[4], Hon'ble J. Krishna Iyer observed that "the issue of bail is one of Liberty, Justice, public safety and burdened on the public treasury. All of which insists that a developed Jurisprudence of bail is integral to a socially sensitised judicial process after all ,personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of " procedure established by law" The last four word of art 21 are the life of that human rights"

The significance of the word "procedure established by law" in Article 21 is vividly explained by Hon'ble Supreme Court in the case *of Maneka Gandhi v. Union of India*[5]. The procedure which was arbitrary oppressive or fanciful was no procedure at all. A procedure which is unreasonable could not be said to be in conformity with Art 14 because the concept of reasonableness permeated that Art *in toto* Hence the procedure established must adhere to the principles of natural justice

Article 21 is the Ark of the Covenant so far as the fundamental rights chapter of the constitution is concerned. It deals with the nothing less sacrosanct then the rights of life and personal liberty of the citizen of India and others persons. It is the only article in the Fundamental Right's chapter alongwith article 20 that cannot be suspended even in an emergency (Art. 359(1)) of the constitution. At present Art 21 is repository of a vast number of substantive and procedural rights

Object of Granting Bail under American Jurisprudence:

"While the granting of bail lies within the discretion of the court, the granting of denial is regulated to a large extent by the facts and circumstances of each particular case since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgement of the court the primary objective is whether recognizance or bond would effect that end."

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances the cumulative effect of which must enter into the judicial verdict. Any one single circumstances cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

The object of bail is neither punitive nor preventive. The deprivation of liberty must be considered as punishment unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment beings after conviction and that every man is deemed to be innocent until duly tried and duly found guilty.

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[4] 1978 SCC 240 P 242 Para 1
[5] AIR 1978 597SC

Presumption of Innocence:

Presumption of innocence has been acknowledged throughout the world. Article 14(2) of the International Covenant on Civil and Political Rights 1966 and Art 11 of the Universal Declaration of Human Right 1948 acknowledge the presumption of innocent as a cardinal principle of law until the individual is proven guilty

Section 438 CrPC has been examined in the prism of leading judgements of SC of India. In *Gurubaksh Singh Sibba v. State of Punjab*[6], Supreme Court laid down following principles in respect of anticipatory bail-

(a) Registration of FIR is not a condition precedent to exercise the power under Section 438;
(b) Interim order can be passed without notice to Public be given;
(c) Order under Section 438 would not affect the right of police to conduct investigation.
(d) Where a case has been made for remand under section 167(2) or reasonable claim to secure incriminating material under sec27 of the Evidence , the power under Section 438 should not be exercised;
(e) Blanket order of Anticipatory bail should not be made

In *Sushila Aggarwal v. State of N.C.T Delhi*[7], the protection granted to a person under Section 438 Cr.PC should not invariably be limited to a fixed period; it should be in favour of the accused without any restriction on time. The conditions can be imposed by the concerned court while granting pre-arrest bail order including limiting the operation of the order in relation to a period of time if the circumstances so warrant, more particularly the stage at which the anticipatory bail application is moved. The life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. If there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

Points to be kept in mind by courts, dealing with applications under Section 438 Cr.PC:

(a) When a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts such as relating to the offence, and why the applicant reasonably apprehends arrest, and not vague or general allegations, relatable to one or other specific offence
(b) Depending on the seriousness of the threat of arrest the court should issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.
(c) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it.
(d) An order of anticipatory bail should not be blanket in the sense that it cannot operate in respect of a future incident that involves commission of an offence. An order of anticipatory bail does not in any manner limit or

[6] (1980) 2 SCC 565
[7] 2020 SCC Online 98

restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

(e) If and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail.

(f) It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term.

In *Satender Kumar Antil v. Central Bureau of Investigation*[8], the Supreme Court issued guidelines for the courts below. The guidelines are as under-

Categories/Types of Offences-

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc.

D) Economic offences not covered by Special Acts.

Requisite Conditions-

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an accused along with the charge sheet (*Siddharth v. State of UP*, 2021 SCC online SC 615)

Category A-After filing of charge sheet/complaint taking of cognizance

a) Ordinary summons at the 1st instance/including permitting appearance through Lawyer.

b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.

e) Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or by granting interim bail till the bail application is decided.

Category B/D-On appearance of the accused in Court pursuant to process issued bail application to be decided on merits.

Category C-Same as Category B & D with the additional condition of compliance of the provisions of Bail under NDPS S.37, 45 PMLA, 212(6) Companies Act 43 d(5) of UAPA, POSCO etc."

Needless to say that the category A deals with both police cases and complaint cases.

[8] Miscellaneous Application No.1849 of 2021 on 11 July, 2022

The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

We may also notice an aspect submitted by Mr. Luthra that while issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimatur and naturally the bail application to be ultimately considered, would be guided by the statutory provisions.

The suggestions of learned ASG which we have adopted have categorized a separate set of offences as "economic Offences" not covered by the special Acts. In this behalf, suffice to say on the submission of Mr. Luthra that this Court in *Sanjay Chandra* v. *CBI*[9], has observed in para 39 that in determining whether to grant bail both aspects have to be taken into account:

a) seriousness of the charge and
b) severity of punishment.

Thus, it is not as if economic offences are completely taken out of the aforesaid guidelines but do form a different nature of offences and thus the seriousness of the charge has to be taken into account but simultaneously, the severity of the punishment imposed by the statute would also be a factor.

Concluding Observations:

The discussion in the foregoing pages makes it amply clear that while considering the application for the grant of anticipatory bail , the court has to consider the nature of the offence, the role of the person accused, the likelihood of his influencing the course of investigation or tampering with evidence or likelihood of fleeing justice in a way anticipatory bail in a matter of discretion in which facts and circumstances of the case play and important role most importantly the Hob'ble Court has held that protection granted to a person U/s 438 Cr.P.C should not invariably be limited to fixed period and it should work in favour of the accused without any restriction on time .Thereby life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed , but continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

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[9] (2012) 1 SCC 40

HINDU DAUGHTER'S RIGHT TO INHERIT PROPERTY: AN ANALYSIS

Shreya Pandey*

"The rights of women in the family to maintenance were in every case very substantial rights and on whole, it would seem that some of the commentators erred in drawing adverse inferences from the vague references to women's succession in the earlier Smritis. The views of the Mitakshara on the matter are unmistakable. Vijneshwara also nowhere endorses the view that women are incompetent to inherit."

-Supreme Court of India[1]

Abstract-With the purpose of removing gender disparity and provide daughters equal status and rights like male members of the Joint Hindu Family, the Indian Parliament amended the Hindu Succession Act, 1956 in the year 2005 which has been termed as a turning point for the protection of daughters and other female family members. The present paper, with special reference to case laws, deals with daughter's right to inherit property under the Hindu Law.

Keywords-Daughter, Inheritance, Succession, Gender-disparity.

Introduction:

Back in the days, there was countless gender discrimination in India, and daughter's rights on father's property was also one of them. Daughters had no equal rights as sons used to have rights on their father's property. Also, there were such rights for women who could not inherit the property, like-Section 24 of the Hindu Succession Act, 1956[2] dealt with certain widows remarrying may not inherit as widows which is now omitted after the amendment of the Act in 2005. In India, the laws relating to land rights of Hindu Undivided Family, in present days are governed by Hindu Succession Act, 1956 which prescribes inheritance rights for four religions *i.e.,* Hindu, Buddhist, Sikh and Jain. Accordingly, other religions like Muslim and Christian also have their own laws. In present days Hindu Succession Act gives equal rights to the daughters as the sons have by birth, whether the father is alive on the date of amendment or not, it will not affect the right of inheritance property.

In a landmark judgment, *Vineeta Sharma v. Rakesh Sharma*[3]*,* the Supreme Court held that the daughters have the equal rights in the Hindu Undivided Family by birth, as the son have for their father's property and also the Court held that since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on the date of the Amendment. In this case the Supreme Court also gave some explanation about Section 6 of the Hindu Succession Act, 1956 as-

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[1] *Arunachala Gounder v. Ponnuswamy,* Civil Appeal No. 6659 of 2011 on 20 January, 2022 (Supreme Court).

[2] Omitted by section 5, the Hindu Succession (Amendment) Act, 2005 (w.e.f. 9-9- 2005).

[3] (2020) 9 SCC 1

> "The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal."

In the above case, Hon'ble Supreme Court overruled *Prakash v. Phulavati*[4] and in *Danamma v. Amar*[5].

Daughter's Right to Inherit Property:

Before the enactment of Hindu Succession Act, in India, the people of Hindu Community were following the laws of Shastric and Customary rites. There are two Schools of the Hindu Law *i.e.,* Dayabhaga School and Mitakshara School. Dayabhaga School is only followed in North East part of the India and also in Bengal. Mitakshara School is followed in rest of the India. In Mitakshara School, traditionally the women are not given equal rights as male have in joint Hindu family for inheritance of the property. Joint Hindu Family is a fundamental aspect of life of Hindus. According to Mitakshara law, it consists of the common ancestor and all his lineal male descendants up to any generation, in addition to the wife(s) or widows and unmarried daughters of the common ancestor and the lineal male descendant.[6] Judiciary also defined joint Hindu family mentioning that there should be at least one male member to fulfill the purpose of joint Hindu family.[7] In the case of *Surjit Lal Chhabda v. Commissioner of Income Tax*[8] the court observed that a joint Hindu family, with all its incidents, is a species of law and cannot be produced by the act of parties, save to the extent that a stranger may be linked with the family by adoption. In *Navneet Arora v. Surender Kaur*[9], the court defined Joint Family as: "Joint Family" means a family of which the members live together, have a common mess and are descendants from a common ancestor and shall include wives or husbands, as the case may be, of its member, but shall exclude married daughters and their children. For the devolution of the property the devolution by survivorship was followed in Mitakshara School. The rule of survivorship applies only to joint family property or coparcenary property. This rule states that a share of a property's coparceners differs and are likely to shift according to deaths and births in the family. When a family member dies,

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[4] (2016) 2 SCC 36
[5] (2018) 3 SCC 343
[6] https://samarthagrawalbooks.com/2021/08/05/joint-hindu-family/
[7] *Gowli Buddanna v. Commissioner of Income-tax*, AIR 1966 SC 1523.
[8] 1976 SCR (2) 164
[9] FAO(OS) 196/2014 on 10 September, 2014 (Delhi)

the coparcenary property grows; and when a family member is born, the coparcenary property drops.

On the other hand, the Dayabhaga School emphasises succession as the only form of property devolution. The succession rule applies to separate property by a person. The separate property includes self-acquired property.[10] The Hindu Succession Act came into force on 17th June, 1956. The main objective of this Act was to govern the intestate succession. Hence, when a Hindu, Buddhist, Sikh or Jain dies intestate, in such case how their intestate will devolve, by inheritance or by survivorship rule, is dealt with in it.

There are two types of succession *i.e.,* testamentary property and intestate property-

(a) Testamentary Property-It is a Will for executing the property after the death of the owner of the property. The word 'Will' is defined under Section 2(h) of the Indian Succession Act, 1925 as the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. The Will includes the information that who will get the estate and how the estate will distribute into the legal heirs. In a case[11] the court stated the word 'testamentary' as the meaning of the word 'testamentary' thus: (i) derived from, bequeathed by, or set forth in a Will; (ii) appointed or provided by, or done in accordance with, a Will; (iii) pertaining to a Will, or to the administration or settlement of a Will, testamental.[12] The word testamentary deposition states that the passing of property to another upon the death of the owner. A disposition of property by way of a gift, Will or deed which is not to take effect unless the grantor dies or until that event.[13]

Anyone can make a Will for his property at any time of his life of a person, according to the Section 59 of the Hindu Succession Act, as every person of sound mind not being a minor may dispose of his property by Will. A Hindu married woman can only make a Will on that property which she can alienate during her life time. If a person who is deaf, dumb or blind, prepares a Will then he has to prove it that he was aware of that decision. If a person who is insane or mental ill and makes a Will then that Will will be invalid but if a person is of sound mind and subsequently becomes insane then Will of his property will be valid at the time of sound mind. The testamentary property should be divided into the widow, son, daughter or on whomever the Will is made.

(b) Intestate Property-Under Section 3(1)(g) of the Act the word 'intestate' has been defined as: A person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect. Hence, when a person dies without leaving behind the testament of the property then the property will be shared in the legal heirs of the owner of the

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[10] *V. Devaraj v. Jayalakshmi Ammal (decsd.) & Others,* C.S.No.159 of 1965 and Applications No.122 of 1969

[11] *S.Narayanan v. V.Meenakshi*, CMP(MD)No.12128 of 2016 on 30 August, 2017 (Madras)

[12] *Webster in Comprehensive' Dictionary in international edition* at page 1298

[13] *Black's Law Dictionary,* [6th Ed. 1991] defines "testamentary disposition" at page 1475

property, according to the inheritance law. Section 8 of the Act lays down the general rules of succession in the matter of Hindu male property. It says that if a Hindu male dies intestate, his property shall devolve upon the heirs who are the relatives specified in class I of the Schedule; if there is no heir of class I, then upon the relatives specified in the class II of the Schedule; if there is no heir of class II then upon the agnates of the deceased and lastly if there are no agnates then upon the cognates of the deceased. After the amendment of the Act disqualifications of the heirs has also been classified, firstly disqualification due to murder *i.e.,* under section 25 of the Act disqualifies a murderer from inheriting the property of the person whom he murdered. He is treated as non-existent and is not considered a part of the line of descent[14]. Secondly, disqualification due to conversion, sections 26 and 27 of the Act lay down that if a person convert himself into another religion then he will be disqualified form the heir and secondly the inherited property would be considered as the person disqualified died before the intestate.

In this Act there are total two types of properties *i.e.,* self-acquired property and coparcenary property. Self-Acquired property means that any property gained by a person himself, whether through his own means or by the sharing of ancestral property, is his self-acquired property.

The simple meaning of Coparcenary Property is Ancestral Property. This property is inherited by the ancestors of a Hindu family. In Mitakshara School, only male members of the Hindu Joint Family had the right to inherit their property because they were known as 'coparceners'. But after the 2005 amendment Act the sharing of the ancestral property will be equal among both male and female of the Hindu Joint Family.

The ancestral properties may be classified in the following categories-

1. *Property inherited from a paternal ancestor*-This property used to distribute under only the male line of the family. But after the amendment, the daughters also have right in the property by birth. This property inherited by a Hindu male from his father, paternal grandfather, etc., is ancestral property and the share in the property by birth will receive by the children, grandchildren, and great-grandchildren of the person. In a case the Privy Council held that property acquired by daughter's son form his maternal grandmother is no ancestral property in his hand, but it is his own separate property.[15]
2. *Property inherited from a maternal grandfather*-If a property is not ancestral but self-acquired by the maternal grandparents, the distribution will be determined by intestate succession if it has not been bequeathed under a valid Will. As a result, the property is dispersed equally to Class-1 heirs of the intestate, to the exclusion of Class-2 and Class-3 heirs, under the Act's provisions of intestate succession.
3. *Property inherited from partners or from women*-When a Hindu daughter or a woman dies without any issue, her property will devolve to the source of the

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[14] *Nirbhai Singh v. Financial Commissioner*, Revenue, Punjab & Ors., 2017 HC of Punjab and Haryana

[15] *Muhammad Husain Khan v. Kishva Nandan Sahai,* (1937) 39 BOMLR 979

property. Therefore, form where the property came it will go back to the legal heir of the property. If her property is inherited form her father then it will go back to the father's legal heir and if the property is inherited from her father-in-law or her husband then the property will devolve to her father-in-law's legal heir or her husband's legal heir.

4. *Share allotted on a partition*-Under Hindu Succession Act, the share should be allotted on a partition equally. This share takes in a successor by birth. Therefore, if a coparcener dies without any issue with no Will, then the property will automatically pass to the successors by continuation.
5. *Property received by gift or pleasure from a paternal ancestor*- When a Hindu gives his self-acquired or separate property to his son or wishes to give it to him in a will then the question raised as whether such property is the son's separate property or ancestral in his possession as regards his male offspring. The Court observed that it is not necessary under all the circumstances that the property received by gift should be placed as ancestral property in the hand of the manager. Hence, the Supreme Court held that there is no clear way of thinking that the property received by gift or pleasure is a separate property of the son or it belongs to the ancestor, the decision will be based on the circumstances of the cases.[16]

Hindu Succession (Amendment) Act, 2005:

The Hindu Succession Act was amended on 5th September, 2005. This Act lays down a uniform and comprehensive system of inheritance and succession into one Act. Now the question arises that why it was important to amend this Act and what was the reason behind it. Law changes according to the society's behavior. As we have already discussed that in India countless gender discrimination were having and female's right on land was one of them. So, as the society started to develop themselves then the females also started to ask for their rights. Hence, the huge reason for amending this Act was to remove the gender discrimination and provide the equal rights to the females in property.

After the Amendment of Hindu Succession Act in 2005, a confusion raised related to the amendment that whether the father should be alive at date of amendment of the Act or not. This issue came before courts in many cases. In *Prakash v. Phulwati*[17]*,* the court held that it is important to be alive of the father at the time of amendment of the Act because the right of living co-parcener can only be claimed by the living daughter. After two years of this case, the Supreme Court was to decide same issue in *Danamma v. Amar*[18]*,* wherein the court took the opposite decision. In this case the court held that it is not necessary to the father to be alive during the date of amendment. Even if the father has passed away before the date of amendment, the right will be same for the daughter. Hence, daughter's right will not be affected after the death of the father. Again, after two years of the judgment of the *Danamma v. Amar*[19], same issue came in

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[16] *C. N. Arunachala Mudaliar v. C. A. Muruganatha Mudaliar and another*, 1954 SCR 243

[17] (2016) 2 SCC 36

[18] (2018) 3 SCC 343

[19] (2018) 3 SCC 343

the case of *Vineeta Sharma v. Rakesh Sharma*[20], in which the court overruled both above cases and held that by birth daughters have the equal right in their father's property as the sons are having.

Before Section 6 of the Hindu Succession Act, 1956 amended, it provides for devolution of interest of coparcenary. This section says that the property shall be devolved on the male coparceners who have an interest in the coparcenary property but these interests in the male coparceners was limited only on the male son, grandson, and great grand-son and the interest were devolved by the way of survivorship. Specially, the Hindu Succession Act, 1956 prohibited females from acquiring any share in the property and also the wife was not considered as a direct blood line of the deceased.

To remove the gender disparity, in 2005 an amendment was bought in Section 6 of the Hindu Succession Act, 1956. This section now provides equal rights to the both sons and daughters as a coparcener. The Mitakshara coparcener liabilities would apply equally to daughters. The Act was extended and now in the devolution of interest also includes female coparceners *i.e.,* daughters, grand-daughters, and great-granddaughters. Hence, we can see that Section 6 aims to provide females the same rights as coparceners as sons.

In a recent case *Arunachala Gounder v. Ponnuswamy*[21], the Supreme Court has analysed in detail this issue. This case is analysed in detail as under-

Fact of the Case-Before getting to the facts of the case, it is important to know about the family members of the case, how many members were there and what were their relations between them. In this case, there were two sons of Gurunatha Gounder namely Marappa Gounder and Ramasamy Gounder. Marappa Gounder had only one daughter Kuppayee Ammal and on the other hand Ramasamy Gounder had one son and four daughters namely Guruntha Gounder who was the son of Ramasamy and Thangammal, Ramayeeammal, Elayammal and Nallammal were the daughters of the Ramasamy. Guruntha Gounder had four off-springs namely Ponnuswamy, G. Thangammal, Papayee and Kannammal. Thangammal had three off-springs Arunachala Gounder, Venkatachalam and A. Mottaiyappan. Ramayeemal had two children-Samathuvam and Kannayan.

In the year of 1938 by the court auction process Marappa Gounder purchased a suit property. The suit for partition was filed by the daughter of Ramasamy Gounder *i.e.,* Thangammal who claimed for $1/5^{th}$ share in the suit property on the allegation that they all five are the children of Marappa Gounder's brother. Ramasamy Gounder predeceased his brother who left all his property behind the sole daughter Kuppayee Ammal who also died issueless in 1967. Further, after the death of Marappa Gounder, his property was inherited by Kuppayee Ammal and upon her death in 1967, all the five children of Ramasamy Gounder. After the death of Thangammal, his suit was contested by his daughter Arunachala after the death of his two sons.

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[20] (2020) 9 SCC 1

[21] Civil Appeal No. 6659 of 2011 on 20 January, 2022 (Supreme Court)

However, the respondent set up that Marappa Gounder died on 11.05.1949 not on 14.04.1957 hence, the respondent contested that Guruntha Gounder was the sole heir of Marappa Gounder and accordingly he inherits the suit property and he was in possession and enjoyment of the property. They also said that after the death of Guruntha Gounder respondents have right to acquire the property of Marappa Gounder.

After considering the evidence of both the parties about the correct date of death of Marappa Gounder the trial court concluded that Marappa Gounder died on 15.04.1949. Hence, the suit property would devolve upon the sole son of Ramasamy Gounder, the deceased brother of Marappa Gounder by survivorship and the appellant had no right to file the suit for partition and accordingly the court dismissed the suit.

Issues-There were two issues raised before the court *i.e.,* firstly who would be the heir towards the father's self-acquired property if he only had a daughter or a brother's son; and secondly if the property is to be devolved to the daughter by succession, what happens after her death.

For the first issue before the court, the Trial and High Courts both ruled that the property will pass through survivorship rather than succession because the father had no male offspring and the daughter died without issue, the property would pass through survivorship to the son of the deceased brother. And for the second issue the Supreme Court held that the self-acquired property would pass to the daughter through succession rather than the brother's son through survivorship, despite the fact that the succession occurred prior to the enactment of the Hindu Succession Act.

Judgment of the Court-In this case, the Supreme Court held that in the event of an intestate Hindu male's death, his self-acquired property would pass through inheritance rather than succession. Furthermore, any property obtained by the partition of a coparcenary or family property will also be eligible for inheritance by the daughter. The court also added that "if a female Hindu dies intestate without leaving any issue, then the property inherited by her from her father or mother would go to the heirs of her father whereas the property inherited from her husband or father-in-law would go to the heirs of the husband. Thus, if a female Hindu dies leaving behind her husband or any issue, then Section 15(1)(a) comes into operation and the properties left behind including the properties which she inherited from her parents would devolve simultaneously upon her husband and her issues as provided in Section 15(1)(a) of the Act." Also, the court observed that "the basic aim of the legislature in enacting Section 15(2) is to ensure that inherited property of a female Hindu dying issueless and intestate, goes back to the source." The Court also discussed about Section 15 and Section 16 of the Hindu Succession Act, 1956 and also referred many cases.

Concluding Observations:

Traditionally, the daughters, particularly in Hindu society being governed by Mitakshara School, were not part of the coparcenary and thus being not entitled to share the coparcenary property. It was an indication of gender

discrimination and a message that the female members of the Joint Hindu Family are inferior, in terms of right to claim inheritance, to the male family members. This disparity has been removed by the Indian Parliament through an Amendment Act, 2005. This initiative was intended to empower women and provide them equal status and restore their respect in the family of their birth. After enactment of 2005 Amendment Act, there was some confusion which has been clarified by the Indian Judiciary which certainly will remove the doubts. The daughters, being a part of coparcenary, now has equal rights in property.

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Notes and Comments

MOHORI BIBEE *v.* DHARMODAS GHOSE, (1903) L.R. 30 I.A. 114

Aditi Pandey*

Introduction:

It is very well known case related to the agreement by minors. This case was finally decided by the Privy Council. This case ruled that the agreement made by the minors are void *ab initio*. Actually, section 11 of the Indian Contract Act does not specifically mention regarding the nature of minor's agreement and because of this there was confusion in legal arena. This case cleared the situation prevailing in the field of minor's agreement.

Bench of Judges:

Lord Mcnaughton, Lord Davey, Lord Lindley, Sir Ford North, Sir Andrew Scoble, Sir Andrew Wilson.

Facts:

- Dharmodas Ghose was a minor and sole owner of his property, resident of Howarah near Calcutta in West Bengal. On his behalf, his guardian was his mother named Jagendra Nanadini.
- He had various movable and immovable properties. He was needed loan on his property. He mortgaged his immovable property and took the loan from money lender who was Brahmo Dutta.
- Kedarnath was the agent of Brahmo Dutta. (The contract of agency's principle is applied here). The total amount of loan was Rs. 20,000 at 12% interest per annum.
- Dharmodas Ghose got the advance payment of 8000 rupees and the remaining amount was left.
- The guardian of Dharmodas Ghose gave a legal notice to the Kedarnath in which she said that Dharmodas Ghose was a minor and you are not able to make contract with him.
- Meanwhile, Kedarnath got signed a document from the Dharmodas Ghose in which it was written that he already had got the amount of 8000 rupees as an advance payment and he will take the remaining 12000 rupees when he obtains majority and repay the amount of loan taken by him.
- After that Dharmodas Ghose along with his mother served a legal action again to Brahmo Dutta by saying that the mortgage was commenced when he was a minor so such mortgage was void and improper as a result of which such contract should be revoked.
- When this petition was in process, Brahmo Dutta died and the further appealed was litigated by his executor.
- The plaintiff argued that no relaxation should be provided to them as defendant dishonestly misrepresented his age.

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Issues:

- Is this contract void or voidable?
- Whether defendant was liable to return the amount of loan which he had received by him?
- Whether the mortgage commenced by him is voidable or not?

Defendant's Contentions:

- Minor had fraudulently misrepresented his age. Principle of law of estoppel should be applicable against him. He tried to make this contract as a voidable contract.
- The defendant pleaded that no relief should be given to the minor.
- If the mortgage is cancelled as requested by the minor, he should also have asked to refund the loan which he had taken.

Judgement:

- The lower court delivered verdict in the favour of plaintiff that such mortgage contact that was commenced between plaintiff and defendant is void as the plaintiff was minor at that time.
- Brahmo Dutta was not satisfied with the verdict of lower court and filed appeal in Calcutta High Court. Calcutta High Court agreed with the verdict of lower court and gave the decision in the favour of plaintiff as well as dismissed the appeal of Brahmo Dutta.
- Here Brahmo Dutta died so on the behalf of him, his wife Mohori Bibee filed appeal on the Privy Council, but the Privy Council also dismissed appeal and held that there cannot be any sought of contract between a minor and a major person.
- Principle of estopple is not applicable against a minor according to section 115 of the Indian Evidence Act.
- So, the final decision held by the Council was that a contract with minor is void *ab initio*. As a minor is incompetent to contract and thus it was held that minor could not be asked to repay the loan as well as advance payment that was taken by him.

Conclusion:

In this case it was held that any contract in which minor is involved is treated as a null and void contract because these types of agreement/contracts are no agreement/contract in the eyes of law. As well as the minor's parents or custodians are not going to be liable for the repayment of any type of amount taken by minor.

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